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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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PAGE

UNITED STATES WAREHOUSE ACT

VALLEY FEED MILL INC. OF PARIS.
USWA Docket No. 86-2.
DISMISSAL ORDER 1746

CONSENT DECISIONS

ISSUED DURING OCTOBER 1987 1747

In re: D. DeFRANCO & SONS, INC., a/t/a NEW ENGLAND TOMATO COMPANY.
I&G Docket No. 74.
Order filed October 22, 1987.

Robert Ertman, for Complainant.
Jules Kabat, Beverly Hills, California, for Respondent.
Order issued by Paul Kane, Administrative Law Judge.

ORDER

Complainant has moved to dismiss this case, stating that further proceeding are not necessary to effectuate the purposes of the Agricultural Marketing Act of 1946.

Accordingly, it is ordered that the complaint in this action be, and hereby is, dismissed.

In re: JERRY H. HODGE, d/b/a RED RIVER LONGHORNS.
A.Q. Docket No. 299.
Order filed October 6, 1987.

Robert Broussard, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL

In accordance with complainant's motion, the case is hereby dismissed.

In re: J.R. and SANDRA MAIKE, d/b/a MAIKE HUNTING CLUB, SANDY'S KENNELS and MILL CREEK KENNEL; PRAIRIE WINDS KENNEL, INC., and SYLVIA M. SIMMONS.
AWA Docket No. 421.
Order filed October 13, 1987.

Robert Frisby, for Complainant.
Frank M. Rico, Topeka, Kansas, for Respondent.
Order issued by Paul Kane, Administrative Law Judge

SUPPLEMENTAL ORDER

On September 4, 1987, the Administrative Law Judge issued an order in the above-captioned matter, which, *inter alia*, suspended both of respondents' licenses for fifteen (15) days and thereafter until respondents complied with the Act and the regulations and standards issued thereunder. This suspension began on August 27, 1987.

The respondents have each demonstrated to APHIS that they are in full compliance with the Act and the regulations and standards issued thereunder. Accordingly,

IT IS HEREBY ORDERED that the suspensions issued September 4, 1987, are terminated. The order shall remain in effect in all other respects.

DISCIPLINARY DECISIONS

In re: WILLIE HUDSON.
P&S Docket No. 6756.
Decision and Order filed September 1, 1987.

Dealer--Insufficient funds draft--Draft drawn by agent.

Summary: Respondent admitted the jurisdictional allegations, the purchase of cattle, but disputed the remaining outstanding purchase price and denied issuing a draft in payment of the cattle. Respondent denied any responsibility in that he did not personally write the draft and his agent did not have the authority to write the draft on his account. This contention is without merit Section 403 of the Act (7 U.S.C. § 223) provides that respondent is responsible for the issuance of a draft by his agent who acts within the scope of his authority on behalf of respondent Respondent was ordered to cease and desist from issuing checks or drafts in payment for livestock without having sufficient funds on deposit to pay such checks or drafts when presented; failing to pay, when due, for livestock purchased; failing to pay for livestock purchased; and issuing drafts in payment for livestock purchased in cash transactions. Respondent was suspended as a registrant under the Act for a period of 5 years (order to be terminated after 180 days upon demonstration that respondent's livestock debts had been paid in full).

Sharlene W. Lassiter, for Complainant.
Jack Bryant, Abilene, Texas, for Respondent
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding brought pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented ("Act"), 7 U.S.C. § 181 *et seq.*, the regulations issued pursuant to the Act, 9 C.F.R. § 201.1 *et seq.* and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, 7 C.F.R. § 1.130 *et seq.* ("Rules of Practice").

The proceeding was instituted by a complaint filed on September 4, 1986, by the Administrator, Packers and Stockyards Administration. It was alleged in the complaint that respondent, in connection with his operations as a dealer subject to the Act, wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228b) in that on or about April 21, 1986, respondent purchased 468 head of cattle from Amarillo Livestock Auction Co. (Amarillo) at a cost of $164,282.69 and issued a draft in payment therefore which was returned by the bank upon which it was drawn because respondent did not have and maintain sufficient funds on deposit and available in the account upon which such draft was drawn to pay such draft when presented.

On December 18, 1986, respondent filed an Answer in which he admitted the jurisdictional allegations, the purchase of the cattle from Amarillo, that an amount on the purchase price remains outstanding but that this amount was in dispute. Further, respondent denied issuing a draft in payment of the cattle.

Oral hearing was held on June 10, 1987, in Abilene, Texas, before the undersigned. Complainant was represented at the hearing by Sharlene W. Lassiter, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. Respondent was represented at the hearing by Jack Bryant, Esq., Abilene, Texas. At the conclusion of the hearing the parties were

afforded to file simultaneous briefs by August, 1987. At the request of the parties, this date was extended to August 17, 1987. Proposed Findings and Brief were filed by complainant on August 17, 1987. As of the date of this Decision, respondent has not filed his brief.

Findings of Fact

1. Willie Hudson, doing business as Willie Hudson Cattle Co., hereinafter referred to as respondent, is an individual whose business mailing address is P.O. Box 137, Colorado City, Texas 79512. (Answer, p. 1; CX 1)[1]

2. Respondent is, and at all times material herein was:

a. Engaged in the business of buying and selling livestock in commerce for his own account; (Answer, p. 1; CX 1) and

b. Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account. (Answer, p. 1; CX 1)

3. On April 21, 1986, respondent purchased 468 head of cattle from the Amarillo Livestock Auction Co., at a cost of $164,282.69. (CX 2)

4. Respondent shipped 452 head of cattle to Tulia, Texas via Plains Livestock Transportation Co., on April 21, 1986. (CX 2; TR, pp. 8-9, 21, 18-19, 31-32)

5. Respondent left 16 head of cattle at the Amarillo Livestock Auction Co., hereinafter referred to as the 16 holdovers. (CX 2; TR, p. 32)

6. In dealing with Amarillo it was respondent's practice since approximately 1982, to provide Amarillo with the name and location of the bank, as well as his account number, on which drafts for his purchases from Amarillo were to be automatically drawn by Amarillo. Amarillo maintained an up-to-date card index of this information which was provided by respondent. No previous drafts issued by Amarillo upon respondent's designated accounts were dishonored. (TR, pp. 19-20, 27, 35-36)

7. As of April 24, 1986, respondent had yet to tender payment to Amarillo Livestock Auction Co. for such livestock purchase, in person or by post. (TR, pp. 21-22)

8. Respondent has yet to pay the full purchase price of the livestock purchased on April 21, 1986. (TR, p. 25)

9. Amarillo Livestock Auction Co. sold the 16 holdovers, and applied the proceeds to the amount of the purchase price which remained outstanding. (TR, pp. 32-33)

10. As of June 10, 1987, respondent owed $150,475.89 of the purchase price for such livestock to Amarillo Livestock Auction Co. (TR, p. 25)

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[1]References to exhibits are designated "CX" for complainant. Respondent did not offer any exhibits. References to the hearing transcript are designated "TR".

Discussion and Conclusions

A. INTRODUCTION

Complainant seeks a five year suspension of respondent's registration, as a registered dealer subject to the Act and regulations, with the proviso that the suspension may be lifted at any time after 180 days upon demonstration by respondent that his outstanding livestock debts have been paid. This sanction is requested as a result of respondent's failure to honor a draft drawn on his account in payment for 468 head of cattle purchased by respondent from the Amarillo Livestock Auction Co., hereinafter referred to as Amarillo; his failure to make payment promptly; and for his continuing failure to pay the balance of the purchase price. (Complaint, paragraph II) The respondent admits the jurisdictional allegations contained in the complaint, the purchase of the cattle from Amarillo, and that he has yet to pay the full purchase price. (Answer, paragraph II) The respondent denies the issuance of the draft in his answer, but proferred no evidence or testimony in his behalf at hearing. (Answer, paragraph II, TR, p. 47) Respondent's cross examination of Mrs. Nelda Brooks indicates that his denial of the issuance of the draft is based on two points: 1) He did not personally write the draft; and 2) Mrs. Brooks did not have the authority to write the draft on his account as his agent. (TR, pp. 26-33, 35) Respondent does not deny that he failed to honor the draft when presented to his bank. Consequently, the only issue in controversy is whether the respondent, through his agent, issued a draft in purported payment for 468 head of cattle from Amarillo.

B. RESPONDENT WILFULLY VIOLATED THE PROMPT PAYMENT REQUIREMENTS OF THE ACT

1. Respondent has an absolute obligation to pay promptly for his livestock purchases.

The respondent as a dealer registered to buy and sell livestock in commerce for his own account, has the obligation to pay promptly for his livestock purchases within the time limit prescribed under the Act. (7 U.S.C. § 228b; 9 C.F.R. § 201.43) Section 409(a) requires that a dealer who purchases livestock shall deliver to the seller or his duly authorized representative the full amount of the purchase price before the close of the next business day. (7 U.S.C. § 228b) Section 201.43 provides that a dealer may remit the purchase price to the seller by cash, check or draft. Respondent purchased 468 head of cattle from Amarillo on April 21, 1986, for $164,282.69. (CX 2, TR, pp. 20-21) Consequently, respondent had an obligation to tender cash, a check or a draft for the full purchase price to Amarillo by the close of business on April 22, 1986.

2. Respondent failed to pay for his livestock purchases in wilful violation of the Act.

At the outset, it must be pointed out that there is absolutely no dispute hat respondent wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213, 228b), by failing to pay Amarillo promptly for his livestock purchases. Section 409 of the Act absolutely obligates a dealer to tender full payment for his livestock purchases promptly. The Judicial Officer has consistently held that the failure to pay promptly for livestock is an unfair and deceptive practice in violation of 312(a) of the Act. (7 U.S.C. § 213(a); *In re C.J.*

Edzards, 37 Agric. Dec. 1880 (1978); *In re Adolf Sklar*, 31 Agric. Dec 872 (1972). Specifically, the Judicial Officer clearly stated that

> "So important is the requirement of prompt payment to the stability of the livestock industry, a cash basis industry, that it is evenly imposed on all persons subject to the Act's jurisdiction, market agencies, packers and dealers, and failing to meet this requirement fully and promptly constitutes a violation of section 312 of the Act, separate and distinct from the violation of issuing insufficient fund checks (or drafts)." *C.J. Edzards, supra* at 1887.

In addition, where the facts show that respondent either intentionally and flagrantly or carelessly and recklessly failed to make full payment for his livestock purchases as required by the Act, such action must be deemed to be wilful. *In re Major Lewis and Henry DeJong*, 33 Agric. Dec. 1294, 1303-1305 (1974).

Here, the evidence clearly shows that the respondent had no intention to pay for his livestock purchase of April 21, 1986. Respondent admitted to the purchase of the 468 head of cattle and that he has yet to pay the full purchase price. (Answer, paragraph II) In fact, the only effort to secure payment for respondent's purchases came from Amarillo, whereby Mrs. Brooks, in accordance with respondent's practice, wrote a draft for the full purchase price on respondent's account at City National Bank, Colorado City, Texas, which the bank returned unpaid. (CX 2, 3, 4, 5, 6) Respondent did not proffer any evidence or testimony to show his efforts to pay the full purchase price. (TR, p. 47) Respondent's only defense is that he did not issue the draft drawn by Mrs. Brooks, which does not negate his failure to pay for his livestock purchase. Respondent did not tender payment for his purchase by the close of the next business day as required by section 409 of the Act, and has yet to pay $150,475.89 of the full purchase price, which are unfair and deceptive practices in violation of 312(a) of the Act. The respondent acted intentionally and in blatant disregard for the statutory requirements which control his operations as a dealer. Therefore, respondent wilfully violated sections 312(a) and 409 of the Act.

C. RESPONDENT IS RESPONSIBLE FOR THE DRAFT DRAWN BY AMARILLO WHICH RESPONDENT FAILED TO HONOR BECAUSE HE DID NOT MAINTAIN SUFFICIENT FUNDS IN THE ACCOUNT TO PAY THE DRAFT WHEN PRESENTED

Respondent is responsible for the issuance of a draft drawn by Mrs. Brooks at Amarillo which respondent did not honor because of insufficient funds in his account. Respondent denies any responsibility in that 1) he did not personally write the draft and 2) Mrs. Brooks did not have the authority to write the draft on his account. The facts which reveal the business relationship between respondent, Amarillo and Amarillo's employee, Mrs. Brooks, challenge the credibility of respondent's defense. Further, under the principles of agency and the provisions of the Act, respondent is responsible.

1.Respondent is responsible for the acts of his agent who acts in his behalf in the issuance of a draft in purported payment for his livestock purchases.

Respondent is responsible for the issuance of a draft drawn on insufficient funds to pay for respondent's livestock purchases on April 21, 1986, which is the result of the agency relationship created with Mrs. Nelda Brooks, an office clerk and bookkeeper at Amarillo, for the purpose of issuing drafts on his account to pay for his livestock purchases at Amarillo. Respondent denies responsibility for the issuance of the draft drawn to pay for his April 21, 1986, livestock purchases. Section 403 of the Act (7 U.S.C. § 223) and the principles of agency applicable to the facts of this case expose the fragility of respondent's position. Section 403 of the Act provides, in pertinent part, that

> "When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any . . . dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission or failure of such . . . dealer. . . ." (7 U.S.C. § 223)

Therefore, respondent is responsible for the issuance of a draft by his agent who acts within the scope of her authority on behalf of respondent.

3. Respondent created an agency relationship with Mrs. Nelda Brooks for the purpose of issuing drafts to pay for his livestock purchases.

The principles of agency applicable to the facts conclusively show that the respondent 1) orally created an express grant of authority to Mrs. Brooks to act as his agent and 2) defined by his actions the extent of her authority to write drafts to pay for his livestock purchases.

A principal, such as the respondent, can create an agent's authority by a unilateral act, in oral or written form, which reasonably leads the agent to act for the benefit of the principal. *Restatement (Second) of Agency* (1958); W. Edward Sell, *Agency*, pp. 25-37, 189-194. (1975) The extent of the agent's authority can be derived by implication from the words or acts of the principal. *Ibid.* However, such authority is limited by what the agent knows to be the principal's desires in light of all then existing circumstances. *Ibid.* The agent's authority may be terminated by the principal's express revocation or a change in circumstances which leads the agent to believe that the principal would no longer wish her to act. *Ibid.*, pp. 189-194.

In the instant case, Mrs. Nelda Brooks testified that respondent came to purchase livestock at Amarillo frequently prior to April 21, 1986, and that his purchases were automatically paid by a draft drawn by Mrs. Brooks. Respondent provided Mrs. Brooks with the bank name, address, and account number which she maintained on a card file at Amarillo. (TR, pp. 19-20) Respondent did not give her explicit instructions every time he wanted a draft drawn. (TR, p. 19) Mrs. Brooks testified that respondent only discussed the drafts when he wanted her to send the draft to another bank with a different account number. (TR, p. 19) Mrs. Brooks testified that she would update her card file whenever she received a new bank name or account number from the respondent by generating a new file card and drawing an "X" on the old file card. (TR, pp. 19-20) Finally, Mrs. Brooks

testified that respondent never wrote his own drafts. Nor, following respondent's procedure, had any previous drafts been dishonored. (TR, pp. 19, 27) Consequently, Mrs. Brooks reasonably concluded that she was to draw a draft automatically in order to pay for respondent's livestock purchases at Amarillo unless respondent instructed her to do otherwise. (TR, pp. 19-20, 27, 35-36) Therefore, respondent orally established an agency relationship which provided Mrs. Brooks with the express authority to act in his behalf for the purpose of writing drafts on his bank account, to pay for his livestock purchases at Amarillo.

4. Respondent is responsible for the actions of Mrs. Nelda Brooks, who acted within her authority as an agent for the respondent, and issued a draft in payment for respondent's livestock purchases on April 21, 1986.

Respondent is responsible for the issuance of a draft drawn by his agent, Mrs. Brooks, to pay for his livestock purchases on April 21, 1986. Respondent purchased 468 head of cattle at Amarillo on April 21, 1986, for $164,282.69. (CX 2; TR, p. 20) Mrs. Brooks testified that respondent removed 452 of the 468 head on April 21, 1986, but did not pay for the cattle before he left Amarillo that day. (TR, p. 21, 32-22) Mrs. Brooks testified further that respondent did not return to Amarillo before the close of business on April 22, 1986 and that Amarillo did not receive any payment by mail from the respondent. (TR, p. 21) Once Mrs. Brooks realized that respondent would not tender payment in any other form, she drew a draft for $164,282.69 on the account of Willie Hudson Cattle Co., City National Bank, Colorado City, Texas, account number 35-276-401. (CX 3; TR, pp. 21-22) Mrs. Brooks obtained the information necessary to complete the draft from the card file on which she recorded the information previously provided by the respondent. (TR, p. 20) Mrs. Brooks then completed the transaction by submitting the draft with a deposit slip to The First National Bank of Amarillo, which sent a cash collection notice to City National Bank. (CX 3, 4, 5; TR, pp. 22, 24-25) Mrs. Brooks testified that she sent a copy of the draft and the purchase invoices to respondent. (TR, p. 22) Subsequently, Amarillo received a notice from its bank which stated that respondent's bank returned the draft unpaid due to insufficient funds in respondent's account. (CX 6; TR, p. 25) Therefore, the facts conclusively show that, pursuant to section 403 of the Act, respondent is responsible for the issuance of the draft drawn by Mrs. Brooks, acting within her authority as respondent's agent, which the respondent did not honor because he did not have and maintain sufficient funds in his account to pay the draft when presented.

D. THE PROVEN VIOLATIONS WARRANT AN ORDER TO CEASE AND DESIST FROM FURTHER VIOLATIONS OF THE ACT AND ISSUING DRAFTS IN PAYMENT FOR LIVESTOCK PURCHASED IN CASH TRANSACTIONS, AND A SUSPENSION OF FIVE YEARS.

The respondent should receive a sanction commensurate with his wilful violations of the Act. Based on the violations proven in this proceeding complainant has recommended that a Cease and Desist Order be issued for all violations listed in the complaint and that the respondent be suspended as a registrant under the Act for a period of five years, with a provision that if the respondent makes full restitution to Amarillo, a supplemental order may be issued to permit respondent to resume business after the expiration of 180 days. (TR, pp. 43-44) The order would also permit respondent to be employed by another registrant after 180 days. (TR, pp. 43-44) This sanction recommendation is based on the violations proven and the severity of those violations. (Tr, p. 44)

Failure to pay for livestock purchases is a serious violation of the Act which clearly warrants the recommended suspension. Stated simply, people who cannot pay for their livestock purchases should not be in the business. Indeed, Congress recently expressed its concern that livestock producers receive payment for this livestock by the enactment of amendments to the Act which impose stringent payment requirements. (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249) In addition, a House Report on the bill related to the amendments of the Act states that,

> Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or no more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the market place. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when the cattle are ready irrespective of the market. His livestock may represent his entire year's output. *And, if he is not paid, he faces ruin.* While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply. (H.Rep.No. 94-1043, 94th Cong. 2nd Sess., p.5; see, also, Sen.Rep.No. 94-932, 94th Cong., 2nd Sess., pp. 5-6), emphasis added.

In recent decisions, the Judicial Officer has stated that the failure to pay for livestock warrants a five year suspension in order to serve as an effective deterrent to future similar violations. *Mid-States Livestock, Inc., et al.*, 37 Agric. Dec. 547, 551 (1977), aff'd., 570 F.2d 701 (8 Cir. 1978); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ___(Feb. 27, 1986).

Therefore, the following order is issued.

Order

Respondent Willie Hudson, directly or through any corporate or other device, his successors and assigns, shall cease anddesist from:

1. Issuing checks or drafts in payment for livestock without having sufficient funds on deposit and available in the account upon which they are drawn to pay such checks or drafts when presented;
2. Failing to pay, when due, for livestock purchased;
3. Failing to pay for livestock purchased; and
4. Issuing drafts in payment for livestock purchased in cash transactions.

Respondent Willie Hudson is suspended as a registrant under the Act for a period of five (5) years, provided, however, that upon application to the Packers and Stockyards Administration, a supplemental order may be issued terminating this suspension at any time after the expiration of 180 days upon demonstration by respondent that Amarillo Livestock Auction Co. has been paid in full, and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit respondent's salaried employment by another registrant after the expiration of the 180 day period of suspension.

[This decision and order became final October 13, 1987.---Editor.]

In re: JEFF McCLANAHAN.
P&S Docket No. 6857.
Decision and Order filed August 25, 1987.

Inadequate bond coverage - Failure to file answer.

Allan R. Kahan, for Complainant.
Respondent, pro se.
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in th Rules of Practice, and the material facts alleged in the complaint, which ar admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 o the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Jeff F. McClanahan, hereinafter referred to as the respondent, i an individual doing business as McClanahan Livestock Co. with a busines mailing address at P.O. Box 1591, Maryville, Tennessee 37802.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock i commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer t buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail received December 2, 1986 that the $10,000.00 surety bond he maintained to secure the performance o his livestock obligations under the Act was inadequate and that it wa necessary to increase his surety bond to $65,000.00. Respondent was furthe notified that if he continued his livestock operations under the Act withou providing adequate bond coverage or its equivalent, he would be in violatio of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 an 201.39 of the regulations. Notwithstanding such notice, respondent ha continued to engage in the business of a dealer buying and selling livestock i commerce for his own account without maintaining an adequate bond or it equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated section 312(a) of the Act (7 U.S.C. 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. 201.29, 201.30).

Order

Respondent Jeff F. McClanahan, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Two Thousand Seven Hundred Fifty Dollars ($2,750.00).

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final October 5, 1987.---Editor.]

In re: WAURIKA LIVESTOCK MARKET, INC., and WILLIAM LEE GILMORE.
P&S Docket No. 6674.
Order filed October 28, 1989.

Jory Hochberg, for Complainant.
J. Michael Morgan, Oklahoma City, for Respondent.
Order issued by Paul Kane, Administrative Law Judge

SUPPLEMENTAL ORDER

On April 10, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondents as registrants under the Act for a period of five years, but which provided that it could be further modified after 180 days to permit respondent William Gilmore's salaried employment by another registrant.

Respondent Gilmore has served 180 days of his suspension and has requested that he be permitted to operate solely as a salaried employee of another registrant. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 10, 1987, is modified to permit respondent Gilmore's salaried employment by another registrant. The order shall remain in full force and effect in all other respects.

In re: CLUM "BUCK" YOCHUM, JR.
P&S Docket No. 6841.
Decision and Order filed September 18, 1987.

Inadequate bond coverage - Failure to file answer.

Peter V. Train, for Complainant.
Respondent, pro se
Decision issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging

that the respondent wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.* governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

Though respondent did file a letter in response to the motion for decision the response admits that he operated without a bond and provides no legally sufficient reason for not entering this order.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Clum "Buck" Yochum, Jr., hereinafter referred to as the respondent, is an individual whose business mailing address is Box 80, Dewey Road, Route 3, New Castle, Wyoming 82701.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and as a market agency to buy livestock in commerce on a commission basis.

2. Respondent was notified by certified mail received February 10, 1986, that the surety bond he maintained to secure his livestock obligations under the Act would terminate on March 12, 1986. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Order

Respondent Clum "Buck" Yochum, Jr., his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations,

without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Dollars ($1,000.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final October 29, 1987.---Editor].

Court Decisions

HARRY KLEIN PRODUCE CORP., Petitioner. v. UNITED STATES DEPARTMENT OF AGRICULTURE, Respondent.
Docket No. 87-4017.
Decided October 21, 1987. [See USDA PACA Docket No. 2-6992, 46 Agric Dec. 134.]

Stephen P. McCarron, Silver Spring, Maryland, for Petitioner.
Aaron Kahn, U.S. Dept. of Agriculture, Washington, D.C., for Respondent.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Before FEINBERG, Chief Judge, PIERCE and ALTIMARI, Circuit Judges
PIERCE, Circuit Judge:

Harry Klein Produce Corp. petitions for review of a decision and order of the Secretary of the United States Department of Agriculture finding that it violated the accurate accounting and prompt payment provisions of Section 2(4) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4). It also challenges the determination that its license should be revoked as a sanction for the violations. Petition denied and enforcement ordered.

Background

Harry Klein Produce Corp. ("Klein") is a produce commission merchant licensed under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq.* (1982 & Supp. III 1985), and doing business at the Hunts Point Market, in the Bronx, New York. Klein sells produce at wholesale on behalf of various growers and shippers. Some of the sales are made on consignment, while others are made for a joint account, that is, for a profit-sharing joint venture between the commission merchant and a shipper.

In 1984, following a complaint to the United States Department of Agriculture ("USDA") that Klein had failed to account properly for and to remit the proceeds from sales of vegetables that had been consigned to it, the USDA investigated Klein's accounting and payment procedures. In 1985, the USDA filed an administrative complaint against Klein for alleged violations of the accurate accounting and prompt payment provisions of Section 2(4) of the PACA, 7 U.S.C. § 499b(4).

Klein answered the complaint, and an evidentiary hearing was held before an Administrative Law Judge ("ALJ"). At the hearing, evidence was adduced that Klein maintained two sets of books relating to its sales of produce, one of which recorded actual sales volume and prices, while the other recorded the sales volume and prices reported to the shippers; and that out of 70 transactions randomly audited by the USDA, 57 showed discrepancies between actual and reported sales, with consequent improper payments to the shippers involved.

Also, there is record evidence from which the ALJ concluded that in order to make the sales figures more appealing to its shippers, Klein estimated the

anticipated aggregate sale proceeds to be received from the sale of particular shipments of produce, and then constructed volume and sales figures for individual transactions that would correspond to the reported aggregates and that would make Klein appear to be a more effective seller than it really was. In so doing, the ALJ concluded, Klein falsified the quantities sold and the prices for which they were sold, failed to disclose produce dumped as unsalable, and falsified figures for produce damaged in repacking or returned or rejected by buyers.

Based upon this evidence, the ALJ reported that Klein had wilfully and repeatedly failed to comply with Section 2(4) of the PACA, 7 U.S.C. § 499b(4), and the regulations promulgated thereunder, 7 C.F.R. § § 46.2(y)(1)-(2), (aa)(1), 46.29, and recommended that Klein's license be revoked. Klein appealed this decision to the Secretary of Agriculture (the "Secretary"), acting through the Judicial Officer, his designated agent with delegated authority. *See* 7 C.F.R. § 2.35. The Judicial Officer confirmed the findings of the ALJ and ordered the license revoked. Klein petitioned this Court for review of that decision pursuant to 28 U.S.C. § 2342 (1982).

No issue is raised in this case as to whether the Secretary's decision is supported by substantial evidence. Rather, Klein challenges the conclusion that it unlawfully falsified its accountings and instead urges us to find that there is a conflict between the prompt payment and accurate accounting regulations that renders simultaneous compliance impracticable. Klein asserts that in order to comply with the USDA requirement that sale proceeds be remitted to the shippers within ten days of the final sale of the produce, 7 C.F.R. § 46.2(aa)(1), it was forced to adjust the actual sales figures in order to reflect anticipated returns, rejections, and damages, as well as the risk of buyer non-payment. These items, Klein argues, which it was entitled to deduct from the payment remitted, were generally unknown at the time Klein was obliged to remit its payments; and it might take three to six weeks from the date of sale before Klein received payment from its buyers and had complete information and documentation as to losses, offsets, and damages that it was entitled to deduct from the payment due.

Klein asserts that since, as a practical matter, it was unable to comply with the accurate accounting and prompt payment requirements simultaneously, it effectively was forced to choose which one to comply with, and that it therefore chose to make prompt payment. It claims to have based its remittances on its own estimations, calculated with reference to its forty years' experience in the industry, of the probable deductions and other credits that eventually would have to be offset against the anticipated sale proceeds.

Klein also challenges the license revocation on the grounds that the sanction is too severe. It claims that since it was "forced" into noncompliance with PACA, revocation is not warranted.

Discussion

The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir.

1983) (citing cases); *see Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert denied*, 389 U.S. 835 (1967). It is an intentionally rigorous law whose primary purpose is to exercise control over an industry "which is highly competitive and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." S. Rep. No. 2507, 84th Cong. 2d Sess. 3 (1956), *reprinting* H. Rep. No. 1196, 84th Cong., 1st Sess. (1955) *reprinted in* 1956 U.S. Code Cong. & Admin. News 3699, 3701, *quoted with approval in Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1028 n.2 (5th Cir. 1982).

The PACA requires all consignees and persons selling for a joint account such as Klein, to remit "full payment promptly" to the shippers, which means that payment of the net proceeds or profits of the sale transactions must be made within ten days of the date of final sale of the produce. 7 C.F.R. § 46.2(aa)(1).[1] The PACA also requires these merchants "truly and correctly to account" for the disposition of all produce sent by a shipper and for the proceeds or profits of all sales. 7 U.S.C. § 499b(4).

In this connection, the USDA has established by regulation a detailed set of recordkeeping and disclosure requirements designed to ensure that a consignee maintains complete and accurate records of its transactions and that shippers obtain the payments to which they are entitled. In particular, a seller such as Klein is required to specify in its accounting to its shippers the date of final sale of the produce, the quantities of goods sold and the prices for which they were sold, the disposition of produce other than by sale, and the expenses properly chargeable as offsets to the sale proceeds. 7 C.F.R. § § 46.2(y)(1)-(2). The consignee's own records must also contain specific information regarding goods returned or rejected by a buyer, goods dumped as commercially worthless, and regarding other allowable expenses. *Id.* §§ 46.21-.22, .29.

In this context, Klein's assertion that it was entitled to estimate, based on prior experience, the likelihood and magnitude of returned and rejected produce, and to falsify the quantities of goods sold and dumped, is unpersuasive. Even if the rules were in conflict, as Klein asserts, there would be no warrant for countenancing Klein's intentionally inaccurate filings in light of the meticulous standards imposed by the regulations.

On the facts presented we find there to be no cognizable conflict between the regulation requiring payment within ten days of the final sale, *id.* § 46.2(aa)(1), and the one requiring an accurate accounting, *id.* § § 46.2(y)(1)-(2). There is no doubt that, under one possible reading of the regulations, Klein could have remitted within the allowed period the sale proceeds that it expected to receive if all buyers paid in full and if there were no subsequent returns or other credits. Thereafter, Klein would have been left to seek reimbursement from its shippers for any such allowance as they occurred. *See S.H. Becker Co. v. Morris Okun, Inc.*, 18 Agric. Dec. 300, 304-07 (1959)

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[1]Effective November 20, 1984, the definition of "full payment promptly" in 7 C.F.R. § 46.2(aa)(1) was amended to require payment by the sooner of ten days from the date of final sale or twenty days from the date of acceptance of a shipment. We take no position on the effect of this amendment on the regulatory scheme, but note that it does not affect our analysis of Klein's conduct in this case. *See* 49 Fed. Reg. 45,735, 45,739 (1984) ("These changes will not change the current administration of the program in significant ways . . . .").

(consignee may recover money remitted to shipper in event of buyer non-payment.

The USDA contended both in its brief and at oral argument that the Secretary has adopted a policy of requiring a consignee to remit proceeds within the prompt payment period only to the extent that it had actually received payment, total or partial, from its buyers, with subsequent remittances to be made as additional payments are received. If indeed there were such an official interpretation of the regulations, we would accord it substantial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, we can find no record verification that such a policy exists.[2]

Well-established principles of administrative law require no deference to administrative interpretations presented for the first time in appellate litigation. *See Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (citing cases); *see also National Ass'n of Greeting Card Pub. v. United States Postal Serv.*, 569 F.2d 570, 600 (D.C. Cir. 1976) (per curiam) (agency interpretation not necessarily entitled to deference when "offered in the wake of litigation which turns on those very regulations"), *vacated on other grounds sub. nom United States Postal Serv. v. Associated Third Class Mail Users*, 434 U.S. 884 (1977). One proper procedure for an agency to follow in interpreting one of its governing statutes or regulations is to proceed via the rulemaking process of the Administrative Procedure Act, 5 U.S.C. § § 552-553. This procedure is not exclusive, however, and an agency may also use its adjudicatory proceedings to fashion applicable rule interpretations. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974). We conclude from our reading of *Ames*, *National Ass'n of Greeting Card Pub.*, and *Bell Aerospace*, that, in this latter event, it is appropriate for the agency to present its argument early on in its own adjudicatory proceedings and not during appellate review, as here.

However, it is not necessary for us to decide which of the two interpretations of the PACA is correct: the one which requires payment of proceeds even if not yet collected from the buyers or the one which requires payment only to the extent of money collected. That determination is best left for the USDA to make under the methods described above. For the purposes of this case, it is clear that under neither view of the applicable statute and regulations was Klein expected to report incorrect sale prices, or to report sale transactions that never occurred, or to fail to report dumping of merchandise, or to speculate about the quantity of returns and the amount of other credits, or otherwise to report data incorrectly when accounting to its shippers.

As for the challenge to the sanction imposed, the determination of a sanction will not be upset on appeal unless it is found to be "'unwarranted in

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[2]The USDA cited two cases in support of this proposition: *Maulhardt v. H.J. Baumstein & Co.*, 19 Agric. Dec. 874 (1960), and *S.H. Becker Co. v. Morris Okun, Inc.*, 18 Agric. Dec. 300 (1959). We do not find either of them to support the proposed construction, since they only address the question of which party bears the ultimate risk of loss or nonpayment, and not the question of whether payment must be made before proceeds are received.

law . . . or without justification in fact . . . .,'" *Magic Valley Potato Shippers, Inc. v. Secretary*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam) (quoting *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86 (1973)); *see also Chaffin v. Turoff*, 804 F.2d 20, 22 (2d Cir. 1986) (per curiam) ("Administrative agencies have broad discretion to fashion appropriate sanctions . . . ."). There was substantial evidence to support the findings made by the ALJ and the Judicial officer. The record and the applicable law support the revocation, particularly because PACA does not require uniformity of sanctions for similar violations. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam) (citing *Butz*, 411 U.S. at 186). In view of the remedial purpose of the statute and the flagrant and repeated nature of Klein's violations, we cannot say that the Secretary was unjustified in revoking Klein's license pursuant to Section 8(a) of the PACA, 7 U.S.C. § 499h(a). *See Wayne Cusimano, Inc.*, 692 F.2d at 1029-30 (revocation proper sanction for $135,000 underpayment over nine month period).

The petition is denied and we direct enforcement of the order.

In re: LEO'S PRODUCE CO.
PACA Docket No. 2-7518.
Decision and Order filed September 3, 1987.

Failure to make full payment promptly - Failure to file answer.

Peter V. Train, Washington, D.C., for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on May 15, 1987, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1985 through March 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from 81 sellers, 330 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $348,165.26.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Leo's Produce Co., is a partnership consisting of Alfredo Fernandez, Ruben Fernandez, Jr., and Graciela F. Williams, whose address is 1603 South Zarzamora Street, San Antonio, Texas 78207.

2. Pursuant to the licensing provisions of the Act, license number 852019 was issued to respondent on September 23, 1985. This license terminated on September 23, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period July 1985 through March 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 81 sellers, 330 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $348,165.26.

Conclusions

Respondent's failure to make full payment promptly with respect to the 330 transactions set forth in Finding of Fact No. 3, above, constitutes willful repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 26, 1987.---Editor.]

In re: JOSEPH PINTO d/b/a JOE PINTO AND SON, INC.
PACA Docket No. 2-7375.
Decision and Order filed July 20, 1987.

Failure to make full payment promptly - Failure to file answer.

Ben E Bruner, Washington, D.C., for Complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 14, 1986, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January through September, 1985, respondent received and accepted, in interstate commerce, 32 lots of fruits and vegetables, all being perishable agricultural commodities but failed to make full payment promptly of the net proceeds in the amount of $18,949.32. It is also alleged that during the period December 1985 through February 1986, respondent failed to make full payment promptly to 19 shippers of the net proceeds or balances thereof in the total amount of $86,565.92 in connection with 58 lots of vegetables received and accepted on consignment in interstate commerce.

A copy of the complaint was served upon the respondents which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The business address of Joseph Pinto d/b/a Joe Pinto & Son, and Joe Pinto & Son, Inc., is 3301 S. Galloway Street, Unit 110, Philadelphia, Pennsylvania 19148.

2. Pursuant to the licensing provisions of the PACA, on March 4, 1985, license number 850740 was issued to Joseph Pinto, an individual, doing business as Joe Pinto & Son (hereinafter referred to as the individual respondent). The license of the individual respondent terminated on March 4, 1986, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when he failed to pay the annual renewal fee.

3. The individual respondent is the president, treasurer, director and 100 percent stockholder of Joe Pinto & Son, Inc. (hereinafter referred to as the corporate respondent). The corporate respondent is not, and has never been licensed pursuant to the PACA. At all times applicable herein, however, the corporation was operating subject to license under the PACA as a commission merchant, dealer or broker as those terms are defined under Section 1 of the PACA (7 U.S.C. § 499a), and under the direction, management and control of the individual respondent.

4. As more fully set forth in paragraph 6 of the complaint, during the period January through September, 1985, the individual respondent received and accepted in interstate commerce, 32 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds in the amount of $18,949.32.

5. As more fully set forth in paragraph 7 of the complaint, during the period December 1985 through February 1986, the corporate respondent failed to make full payment promptly to 19 shippers of the net proceeds or balances thereof, in the total amount of $86,545.92 in connection with 58 lots of vegetables received and accepted on consignment in interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 32 transactions set forth in Finding of Fact No. 4 above, and with respect to the 58 transactions set forth in Finding of Fact No. 5 above, constitute willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

The facts and circumstances of the violations of the PACA set forth in this decision shall be published.

The Order shall take effect on the first day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding

within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 29, 1987.---Editor.]

In re: PREMIUM PRODUCE CORP.
PACA Docket No. 2-7519.
Decision and Order filed September 8, 1987.

Failure to make full payment promptly - Failure to keep sufficient assets in trust - Failure to file answer.

Jory M. Hochberg, Washington, D.C., for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on May 19, 1987, by he Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1985 through January 1986, respondent received and accepted on consignment in interstate commerce from 12 shippers, 26 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds, or balances thereof, in the total amount of $43,328.19, and that during the period January 1985 through January 1986 respondent purchased, received, and accepted, in interstate commerce, from 35 sellers, 137 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $683,574.60. It is further alleged that with respect to these transactions, respondent failed to maintain sufficient assets in trust.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Premium Produce Corp., is a corporation whose address is 161 Hunts Point, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the Act, license number 850289 was issued to respondent on November 28, 1984. This license was renewed annually, but terminated on November 28, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1985 through January 1986 respondent received and accepted on consignment in interstate commerce, from 12 shippers, 26 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds, or balances thereof, in the total amount of $43,328.19.

4. As more fully set forth in paragraph 6 of the complaint, during the period January 1985 through January 1986 respondent purchased, received and accepted in interstate commerce, from 35 sellers, 137 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $683,574.60.

5. As more fully set forth in paragraphs 5, 6 and 7 of the complaint, respondent failed to maintain sufficient assets in trust.

Conclusions

Respondent's failure to make full payment promptly with respect to the 163 transactions set forth in Findings of Fact No. 3 and 4 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and respondent's failure to maintain sufficient assets in trust as set forth in Finding of Fact No. 5 above, constitutes willful, repeated and flagrant violations of section 5 of the Act (7 U.S.C. § 499e), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Sections 2 and 5 of the Act (7 U.S.C. § § 499b, 499e), and the facts and circumstances set forth above shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final October 16, 1987.---Editor.]

Reparation Decisions

TOM BENGARD RANCH, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5875.
Order issued October 2, 1987.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

CAL-VEG SALES, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5873
Order issued October 2, 1987.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

CASTLE & COOKE, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5904.
Order issued October 26, 1987.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed because any judgment which would be entered against the corporate respondent would be uncollectable and because, therefore, it would be a useless exercise for a presiding officer to spend a considerable amount of time in preparing a report to the Secretary. The

complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

CHIQUITA BRANDS, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5893.
Order issued October 2, 1987.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

CHUNK'S PRODUCE, INC. v. MILO J. IVERSON, d/b/a IVERSON BROKERAGE CO.
PACA Docket No. 2-7674.
Order issued October 28, 1987.
Order Requiring Payment of Undisputed Amount Issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on August 25, 1986, and a formal complaint was filed on June 2, 1987. Complainant seeks to recover $6,300.90 which amount is alleged to be the total purchase price for onions sold to and accepted by respondent on July 22 and July 25, 1986. Respondent filed an answer to the formal complaint on September 21, 1987, admitting that $1,541.90 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $1,541.90. Payment of this

amount shall be made within 30 days from the date of this order with inter thereon at the rate of 13 percent per annum from September 1, 1986, u paid. A failure to pay this amount within 30 days will constitute a violation section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the undisputed amount is left f subsequent determination in the same manner and under the same procedu as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

BRUCE CHURCH, INC. v. LUNA CO., INC., d/b/a BAKERSFIEL PRODUCE & DISTRIBUTING CO.

PACA Docket No. 2-7059.

Order issued October 9, 1987.

Stay Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on September 2, 1987, awarding reparation to the complainant in the amount of $3,189.52 plus interest. By telegram received in the Hearing Clerk's office on September 25, 1987, respondent has moved that this matter be reconsidered. Respondent also requested an extension of time in which to submit a detailed response.

Accordingly, the order of September 2, 1987, is hereby stayed. Responden shall have until October 24, 1987, in which to submit a detailed response as to why the decision should be reconsidered.

Copies of this order shall be served upon the parties.

DeBRUYN PRODUCE CO. v. JOHN E. FAIR d/b/a MRS. FAIRS FINER FOODS.

PACA Docket No. 2-7653.

Order issued October 26, 1987.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a timely complaint was filed in which complainant seeks reparation against respondent in the total amount of $7,343.75 in connection with two transactions in interstate commerce involving potatoes, a perishable agricultural commodity. The complaint was served upon respondent who filed an answer thereto admitting that he owes complainant a balance of $6,000.00 with respect to the two transactions, and also enclosing a letter from complainant's attorney to him. In that letter, after relating the terms of the two transactions, complainant's attorney states:

> * * * this communication is to confirm that my client will cease pursuit of any civil or criminal remedies to satisfy this debt as and so long as you continue to provide to DeBruyn Produce the sum of $1,000.00 per month until these *two (2) invoices* are paid in full, to be paid on or before the 15th day of each month.

After respondent's answer and the complainant's letter was reviewed by the presiding officer, he sent a letter to complainant requiring complainant to show cause why its complaint should not be dismissed because it apparently waived its right to bring this action at this time. That is, complainant has entered into a contract with respondent which requires that it not prosecute any action against the respondent with respect to the two transactions mentioned by its attorney so long as the respondent pays it $1,000.00 per month until the full $7,343.75 has been paid. In complainant's reply to that notice, it claimed the agreement described in its attorney's letter only applied to one of the two transactions involved herein. However, that is clearly not so. In view of the above, and because the record reflects that respondent is in compliance with his agreement with complainant's attorney, we conclude that complainant has failed to state a cause of action in its complaint. Accordingly, the complaint should be dismissed.

The complaint is dismissed.

Copies of this order shall be served upon the parties.

DEL MONTE BANANA COMPANY v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5870.
Order issued October 5, 1987.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

MACK C. DEMPSEY d/b/a MACK C. DEMPSEY CO. v. H & R PRODU DISTRIBUTORS, INC., a/t/a PEPE PRODUCE.
PACA Docket No. 2-7244.
Order issued October 26, 1987.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

After respondent was served with a formal complaint, complainant fil a petition in bankruptcy. The trustee responsible for complainan bankruptcy proceeding notified the Department that he was abandoning h interest in the proceeding. In view of that, it is proper to dismiss th complaint.

Accordingly, the complaint was dismissed.

LAWRENCE DUMAIS & SONS, INC. v. WILLIAM DUBINSKY & SO INC., d/b/a MUSTO and PARMALEE.
PACA Docket No. 2-7561.
Order issued October 28, 1987.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

After respondent was served with a formal complaint, complainant notifi the Department that a settlement had been reached. Complainant authoriz dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

FARMERS EXCHANGE, INC. v. T&M PRODUCE COMPANY.
PACA Docket No. 2-7057.
Decision and Order issued October 20, 1987.

Complainant's burden to prove the terms of the original contract--Where parties disagree o initial contract prices, insufficiency of respondent's accounting considered adverse evidence.

Parties orally contracted for sale of trucklot of cucumbers. Held; inconsistency of respondent statements, its failure to account for the prices at which it remitted payment, and gaps in its explanations were sufficient to enable complainant to carry its burden of proving that the price complainant billed were the prices parties agreed upon.

Jory M. Hochberg, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $1,870.00 in connection with the sale of a trucklot of cucumbers in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer on January 14, 1986, denying liability to the complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure set forth in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. The parties also filed additional evidence in the form of sworn statements. Both parties were given the opportunity to file briefs and complainant availed itself of that opportunity.

Findings of Fact

1. Farmers Exchange, Inc., is a corporation whose business mailing address is P.O. Box 277, Onley, Virginia 23418.

2. T & M Produce Company is a corporation whose business mailing address is State Farmers Market, Office #A-2, 1200 Hammondville Road, Pompano Beach, Florida 33069. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about July 27, 1985, in the course of interstate commerce, complainant by oral contract sold to respondent 150 bushels of small cucumbers at an agreed price of $7.85 per bushel, delivered; 120 bushels of large cucumbers at an agreed price of $6.85 per bushel, delivered; 320 bushels of select cucumbers at an agreed purchase price of $6.85 per bushel, delivered; and 120 bushels of super select cucumbers at an agreed purchase price of $11.85 per bushel, delivered; for a total invoice amount of $5,613.50. In the course of negotiations the parties determined that $1.85 of each of the agreed upon prices was an allowance for freight.

4. On or about July 27, 1985, complainant shipped from loading point in Virginia to respondent's customers at various locations in Florida, the kind, quality, grade and size of commodity called by the contract. All deliveries were made on July 29, 1985.

5. Respondent accepted the cucumbers and issued a check to complainant in the amount of $3,743.00 leaving a balance due of $1,870.00 in connection with this shipment.

6. The informal complaint in this proceeding was filed on August 9, 1985, which was within nine months after the cause of action accrued. The formal complaint was then filed on October 23, 1985.

Conclusions

There are two factual disputes involved in this controversy. [illegible] concerns the contract prices as initially agreed upon by the parti[illegible] second concerns whether the 120 bushels which complainant billed [illegible] select cucumbers were, in fact, super select. With respect to the fir[illegible] it is complainant's burden to prove the terms of the original contr[illegible] *York Produce Trade Association, Inc. v. Sidney Sandler*, 32 A.D. 702 [illegible] Respondent contends that the prices as billed by the complainant [illegible] small cucumbers ($7.85 delivered) exceeded the agreed upon price[illegible] per bushel, and that the prices billed by complainant for the large a[illegible] cucumbers ($6.85, delivered) exceeded the agreed upon prices by $2[illegible] bushel. However, there is sufficient evidence in the record for comp[illegible] to carry its burden of establishing that the billed prices accurately refl[illegible] prices agreed upon by the parties.

First, respondent's statements concerning this dispute not only [illegible] specificity, but are, at times, contradictory and puzzling. In respons[illegible] inquiry from personnel of the U.S. Department of Agriculture, resp[illegible] initially claimed that the contract prices were agreed upon on July 24, [illegible] with the cucumbers to be shipped on July 27, 1985. In reply, compla[illegible] insisted that any discussions on the 24th were of a very general and spec[illegible] nature, but that on July 27 the parties had more detailed discussions [illegible] market culminating in an agreement to pay the prices billed by compla[illegible] In its formal answer, respondent does not directly reply to complainant's [illegible] explicit chronology, except to drop its initial contention that the parties [illegible] to the prices on the 24th. Instead, respondent admits that the agreement [illegible] place on the 27th, but simply contends that the prices billed by compla[illegible] exceeded that agreement. Nor does respondent make any attempt to re[illegible] complainant's evidence that the prices billed were in line with the market, a[illegible] that it was only after investigating other possible sources for cucumbers th[illegible] respondent agreed to purchase the cucumbers from complainant

In addition, it is worth noting that upon receiving complainant's bill [illegible] respondent did not specifically inquire about the prices it claims were hig[illegible] than the prices agreed upon, but simply sent a check in the amount [illegible] $3,743.50 to the complainant. This check, which was issued on Augu[illegible] *1985*, did not itemize or detail the prices respondent was paying for [illegible] various kinds of cucumbers received. In light of respondent's contention th[illegible] it had been billed at incorrect prices, one would expect some minimal eff[illegible] on the part of respondent to identify the correct prices when remitting [illegible] payment to complainant. However, it was not until August 8, 1985, [illegible] receiving a second bill from complainant, that respondent sent a teleg[illegible] which specified the prices it claims the parties had agreed upon.

The insufficiency of respondent's correspondence and the gaps in explanations for the amount remitted become even more apparent in rel[illegible] to the second factual issue in this case. Respondent not only claims that th[illegible] was no agreement for the purchase of Super Select cucumbers, but that th[illegible] Super Selects which complainant shipped and billed for were *rejected* [illegible] respondent's customer on the ground that they were only Selects. Respond[illegible] then contends that "On the advice of [complainant's salesman], th[illegible] cucumbers were then shipped to Beacon Produce . . . and received as su[illegible] cucumbers and marked as such on the freight manifest." Respondent offe[illegible]

an unsworn two sentence statement of a Beacon Produce representative to substantiate this claim. Complainant claims that it instructed respondent to leave the "Super Selects" on the truck, and that if they were unloaded complainant expected respondent to either pay in full or provide an inspection certificate substantiating its claim.

Once again, after receiving complainant's billing for Super Selects (as well as for other prices respondent claims were incorrect, as discussed above) one would expect respondent to provide some itemization, reminder, or accounting with its check in response to complainant's billing if this agreement to bill Super Selects as Selects had taken place. To reiterate, respondent simply issued a check for $1,870.00 less than the billed amount without any attempt to identify the prices on which it was actually paying for the different kinds and quantities of cucumbers received and accepted. Moreover, the telegram later sent by respondent one week after issuing the check, in response to complainant's second billing, still made no mention whatsoever of this alleged agreement to handle the Super Selects as Selects.

Respondent's contentions are simply not plausible. Respondent claims that upon receipt of the cucumbers the parties agreed that the most expensive kind of cucumbers would be billed at the lowest price. Subsequently, upon receipt of complainant's bill, respondent contends it learned that all of the prices shown were also incorrect. Nevertheless, respondent simply issued a check in the total amount which it determined was correct without any attempt to denote the different prices which it was paying for the different kinds of cucumbers and without referring to the alleged agreement to pay for the Super Selects as Selects. Respondent's inconsistency concerning when the prices were agreed upon, its failure to specifically account for the product accepted and paid for, its failure to address the evidence showing that complainant billed at prevailing market prices and its inability to fill obvious gaps in its explanations concerning this dispute support a finding that the parties agreed to the prices billed by complainant.

Accordingly, respondent owes to complainant the sum of $1,870.00. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $1,870.00 with interest thereon at the rate of 13% per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

G.A.B. PRODUCE DISTRIBUTORS, INC. v. FRUITEX CORPORATIO and/or LARRY ELMER, INC.
PACA Docket No. 2-6410.
Order issued October 7, 1987.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed May 16, 1984, pending completion of respondent bankruptcy proceedings. Having heard nothing further, the Presiding Offic suggested that the complaint be dismissed as the matter was, undoubted resolved by the Bankruptcy Court. The complainant was given an opportun to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

MORGAN GARNER & SON v. WILLIAM ANDERSON, and/or WILLIA E. ANDERSON III d/b/a WILLIAM ANDERSON CO., and/or IDAPACI INC.
PACA Docket No. 2-7154.
Order issued October 7, 1987.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER

Pursuant to a Stipulation of the Parties filed herein on September 1 1987, it is hereby ordered that:

(1) The complaint against William Anderson and/or William E Anderson III d/b/a William Anderson Co., is dismissed; and

(2) Within thirty days from the date of this order, respondent Idapac Inc., shall pay to complainant Morgan Garner & Son $49,426.85 as reparation

Copies of this order shall be served upon the parties.

GOLD COAST PACKING, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5912.
Order issued October 2, 1987.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

GRANADA MARKETING, INC. v. DURANTE & TERMINI, INC.
PACA Docket No. 2-6954.
Order issued October 13, 1987.
Order on Reconsideration issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In these reparation proceedings under the Perishable Agricultural Commodities Act, 1930, as amended 7 U.S.C. 499a *et seq.*, an order was issued on November 24, 1986, ordering the respondent to pay complainant, as reparation, $7,521.60, with interest thereon at a rate of 13% per annum from November 1, 1984, until paid. A copy of the order was served upon respondent on December 1, 1986. Respondent timely filed a petition for reconsideration on December 8, 1986, which was within the 10 day period allowed by section 47.24 of the rules of practice.

In accordance with section 47.24 of the rules of practice, 7 C.F.R. § 47.24, the filing of the petition for reconsideration on December 8, 1986, automatically operated as a stay of the order pending final action on the petition. Inadvertently, a stay order was not issued.

Respondent's petition raises contentions and issues which were fully raised and considered at the time the order of November 24, 1986 was issued. The respondent petitions for reconsideration of the decision issued on November 24, 1986, in which the Judicial Officer ordered the respondent, Durante and Termini, Inc., to pay the complainant, Granada Marketing, Inc., as reparation, $7,521.60, with interest. The Judicial Officer found in favor of the complainant on the ground that the respondent misrepresented the results of an inspection report which induced the complainant to agree to a price after sale arrangement with regard to an oral contract for the sale of U.S. No. 1 grapes. Respondent's misrepresentation of material facts made the price after sale agreement voidable, and therefore, the respondent is liable for the full purchase price established by the contract less the amount previously remitted by the respondent. In our opinion, the order of November 24, 1986, is supported by the evidence and by the law applicable thereto. Accordingly, complainant's petition for reconsideration should be and hereby is dismissed, and the order of November 24, 1986, is reinstated with the following modification.

Order

Within 30 days from the date of this order, respondent Durante and Termini, Inc., shall pay to Granada Marketing, Inc., as reparation $7,521.60, with interest thereon at the rate of 13% per annum from November 1, 1984, until paid.

Copies of this order shall be served upon the parties.

L.D. GREENE COMPANY v. PELICAN TOMATO COMPANY, INC.
PACA Docket No. 2-7347.2
Decision and Order issued October 16, 1987.

Failure to reject load, after inspection, constitutes acceptance--Respondent can request and obtain more than one inspection certificate covering differing portions of same lot--Partial inspection of small portion of load taken six days after produce arrived will not be construed to reflect the condition of entire load.

Potatoes purchased from complainant arrived at respondent's place of business, were inspected and graded according to contract. Second inspection taken four days later, approximately 20% of lot did not grade. Held; respondent accepted whole lot by not rejecting. Respondent could have had different portions of same lot of potatoes inspected to insure that all were good. Held for complainant.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Salvador Cusimano, Esq., New Orleans, Louisiana, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $7,956.00, in connection with the sale of one truckload of potatoes to respondent which was shipped in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer and counterclaim, denying liability and claimed a breach of contract by complainant on account of the potatoes' condition, as well as claiming a loss as a result of its attempts to salvage the produce.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is, therefore, applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of this case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an answer to the counterclaim. Respondent filed an Answering Statement and Affidavit. Complainant filed no further evidence.

Findings of Fact

1. Complainant, L.D. Greenee Company, is an individual, Lonnie D. Greenee, doing business as L.D. Greenee Company and whose address is P.O. Box 2170, Olathe, Kansas 66061-2170. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent, Pelican Tomato Company, Inc., is a corporation whose address is P.O. Box 10116, Jefferson, Louisiana 70181. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On October 11, 1985, complainant, by oral contract, sold respondent one carlot of U.S. No. 1 Idaho russet potatoes, consisting of 2,432 cartons of potatoes at $4.87½ per carton delivered, less freight, for a total invoice value of $7,956.00. The potatoes were loaded at Blackfoot, Idaho, and destined for respondent at Jefferson, Louisiana. The potatoes arrived at respondent's place of business on October 20, 1985, and were received and accepted by respondent.

4. A partial inspection of the carlot was held on October 22, 1985. It showed that the potatoes graded U.S. No. 1. A second inspection of 500 cartons was held on October 26, 1985. It showed that those cartons did not grade U.S. No. 1.

5. Respondent has failed to remit anything in connection with the transactions set forth in paragraph 3.

6. A formal complaint was filed on March 3, 1986, which was within nine months of when the cause of action stated herein accrued.

Conclusions

Respondent's answer states that the potatoes arrived on October 20th, but when the railroad car was opened, a foul smell was detected. A USDA inspection was requested, and was conducted on October 22, where the potatoes were inspected and graded US No. 1, which met requirements by the contract. For some unknown reason, however, inspection was limited to the product in the upper four layers of potatoes between the doors. Respondent had it within his power to request and obtain more than one inspection certificate covering differing portions of the same lot (7 C.F.R. § 51.2(e)(2)), but apparently chose not to do so. Upon receipt of the inspection results, and the produce apparently meeting the contract specifications, complainant accepted the potatoes by not immediately rejecting them, and by unloading them. Therefore, it had the burden to show they did not meet contract specifications. *Thereon Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). In addition, section 2-606 of the Uniform Commercial Code provides:

> (1) Acceptance of goods occurs when a buyer
> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
> (b) fails to make an effective rejection (subsection (1) of section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them.

The first inspection showed that the potatoes met contract specifications. The second inspection, held four days after the first and six days after the potatoes arrived, was of only 500 of the 2,432 cartons. It has long been held that a partial inspection of only a small portion of a load will not be construed to reflect the condition of the entire load. *Mario Saikhon v. Russel-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975). Thus, we need not decide whether an inspection six days after arrival could be held to reflect the condition of the potatoes on arrival.

In addition, some of respondent's documentary evidence does not square with portions of its answer. In paragraph C of respondent's counterclaim respondent stated that "In early November, 1985, some of the commodity was sent to the USDA Research Center at Beltsville, Maryland," and a copy of this letter (Respondent's Exhibit 7), received from Beltsville, is attached. The letter, which is dated November 27, 1985, states that the sample which was shipped airfreight, was received and inspected that day. Even assuming the potatoes were shipped to Beltsville the previous day, the 26th, under no stretch of the imagination could that be considered "early November." In any event, the condition of potatoes a month later is irrelevant. Therefore, respondent has failed to prove that complainant failed to deliver potatoes which met contract specifications.

We find that there is $7,956.00 still due and owing from respondent in connection with the shipment of potatoes. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $7,956.00, with interest thereon at the rate of 13% per annum, from December 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

MARK L. HANESS d/b/a C. J.'s BROKERAGE v. ARIZONA FRESH FOODS, INC.

PACA Docket No. 2-6035.

Order Issued October 5, 1987.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

JOHN K. HARMON d/b/a HARMON COMPANY PRODUCE v. A. LEVY DIST. CO., INC.
PACA Docket No. 2-6648.
Order issued October 26, 1987.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed September 26, 1985, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

AL HARRISON DISTRIBUTORS v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5877.
Order issued October 2, 1987.
Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

HOMESTEAD TOMATO PACKING CO., INC. v. J. V. CAMPISI, INC.
PACA Docket No. 2-7195.
Decision and Order issued October 20, 1987.

Open contract price--Market News Service Reports.

Where the parties agree that the contract price was to be open, with the price to be determined based on the prevailing price for the following week, the prevailing price was found to be most accurately determined by the Market News Service Reports' price quotations. These price quotations supported complainant's claim as to the applicable price and reparation awarded to complainant accordingly.

Andrew Y. Stanton, Presiding Officer.
Alexander Pires, Jr., Esq., Washington, D.C., for complainant.
Robert Foster, Jr., Esq., Tampa, Florida, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,400.00 in connection with the sale and shipment of a trucklot of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered to be part of the evidence, as are the verified complaint and answer. The parties were given the opportunity to submit additional evidence in the form of verified statements and file briefs. Complainant submitted an opening statement, respondent an answering statement, and complainant a statement in reply. Complainant also filed a brief.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, J. V. Campisi, Inc., is a corporation whose address is P.O. Box 11177, Tampa, Florida. At the time of the transaction involved herein respondent was licensed under the Act.

3. On January 20, 1985, respondent's broker, James Huber, Immokalee, Florida, contacted complainant's salesman, Tom Banks. Mr. Huber, on behalf of respondent, purchased 1,600 cartons of 6 x 7 Strano Pride tomatoes with a price to be that at which the Florida market ultimately settled for the week of January 21 to 26, 1985.

4. The tomatoes subject to the contract were shipped in contemplation of interstate commerce to respondent, where they arrived and were accepted.

5. According to the Florida Fruit and Vegetable Report, Federal-State Market News for Winter Park, Florida, the market price for 6 x 7 tomatoes of the kind subject to the contract, for the week of January 21, 1985, a Monday, through January 25, 1985, a Friday, was as follows: On January 21 and 22, 1985, there were no prices quoted, as prices were to be established later; on January 23, 24, and 25, 1985, the quoted price was $16.00 per carton.

6. On January 25, 1985, complainant sent an invoice to respondent for the 1,600 cartons of tomatoes, for a price of $16.00 per carton plus $.15 per carton for pallets, for a total of $25,840.00, f.o.b.

7. In February 1985 respondent sent complainant a check for $19,440.00, which was accepted by complainant as partial payment. Respondent has failed to pay the additional $6,400.00 which complainant claims to be due and owing.

8. A formal complaint was filed on October 9, 1985, which was within nine months from when the alleged cause of action herein accrued.

Conclusions

The only subject of dispute concerns the applicable price. The parties agree that the 1,600 6 x 7 tomatoes purchased by respondent from complainant on an f.o.b. basis were initially given an open price. The persons who negotiated the transaction for the parties, complainant's salesman, Tom Banks, and respondent's broker, James Huber, basically agree how the price was to be determined. Mr. Banks has stated in an affidavit that the price was "to be determined the following week, January 21-26." Mr. Huber has stated in his affidavit that the agreement provided for respondent to pay "what the Florida market price ultimately settled down to for the following week, i.e., the week of January 21-26, 1985. . . ." Complainant asserts that the price for the week of January 21 through 26, 1985, was eventually established at $16.00 per carton. Respondent contends that such price was $12.00 per carton.

Complainant's claim is based on the price quotations set forth in the Florida Fruit and Vegetable Report, Federal-State Market News for Winter Park, Florida. These reports show a price for the 6 x 7 tomatoes of $16.00 per carton for January 23, 24, and 25, 1985. This is very strong evidence that the market price for the week of January 21 through 26, 1985, was $16.00 for 6 x 7 tomatoes. See *Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc.*, 42 Agric. Dec. 178 (1983). Respondent argues that the market price did not settle until the week of February 5, 1985, approximately two weeks after the transaction here at issue took place. In support of this position, respondent has introduced into evidence several affidavits from persons claiming to be engaged in the Florida tomato business, and knowledgeable about the price situation in January and February 1985. Three of them state that the market price finally settled at $12.00 per carton for 6 x 7 tomatoes. One affiant ambiguously states that "most" of his customers who purchased tomatoes on an open price basis during the week of January 20 to 27, 1985, were billed at $12.00 per carton for 6 x 7 tomatoes. Affidavits from four persons concerning the prevailing market price, one of which is ambiguous, do not have the weight of the Market News Service Reports, which is an objective representation of prices obtained from numerous sources. These reports show definite price quotations for the 6 x 7 tomatoes in three of the five reports issued during the week of January 21 through 26, 1985. We, therefore, find that the price listed by the Reports of $16.00 is a more credible representation of the market price for the week than the price asserted by respondent.

Accordingly, respondent became liable to complainant for $16.00 per carton, plus $.15 per carton for pallets, or $25,840.00, but has paid only $19,440.00, leaving $6,400.00. Respondent's failure to pay complainant the $6,400.00 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay t

complainant, as reparation, $6,400.00, with interest thereon at the rate of 1 percent per annum, from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J-B MARKETING, INC. v. WHITE BROKERAGE CO.
PACA Docket No. 2-7176.
Decision and Order issued October 13, 1987.

Broker - authority in produce transactions--Damages - failure to prove.

Complainant entered into contract through respondent acting as broker to deliver seed potatoes to a buyer at a future date. Complainant alleged that the buyer notified respondent that it was cancelling the contract and that respondent failed to convey notice to complainant. It was held that even if the allegations of failure to convey notice were true complainant had nevertheless failed to prove damages resulting from respondent's failure.

George S Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $7,602.50 in connection with the sale in interstate commerce of 2,525 hundredweight of seed potatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Respondent also filed a brief.

Findings of Fact

1. Complainant, J-B Marketing, Inc., is a corporation whose address is P.O. Box 158, Rosholt, Wisconsin.

2. Respondent, White Brokerage Co., is a corporation whose address is 7201 W. Fort Street, Detroit, Michigan. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about January 10, 1985, complainant, through respondent acting as broker, sold to Terminal Onion Sets Co., 2,525 hundredweight of seed potatoes at various prices on a delivered basis for shipment in March or April.

4. On January 17, 1985, Terminal Onion Sets Co., notified respondent that it was cancelling the contract.

5. An informal complaint was filed on September 27, 1985, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant alleges in the formal complaint that "Said contract was negotiated by White Brokerage Co., . . . who failed to perform a specification or duty of a broker in connection with said transaction. Respondent accepted the buyer's rejection without authorization from complainant." First, it should be noted that terminology referring to an "acceptance of a rejection" is meaningless in the context of most produce transactions. See *Yokoyoma Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982). In addition, once a contract is formed, a broker in the normal produce transaction, and absent an emergency situation, has no authority to do anything other than relay messages between the buyer and the seller. See *Kirk Produce v. Bruno Dispoto Co.*, 40 Agric. Dec. 1371 (1981); *J. Livacich Produce v. M-K Sons Produce Co.*, 37 Agric. Dec. 1798 (1978); *Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87 (1977); *Stonoca Farms Corp. v. Clary*, 33 Agric. Dec. 956 (1974); *Maurice W. Sanders v. Greenburg Fruit Co.*, 32 Agric. Dec. 1856 (1973); and *Gonzales Packing v. Price*, 25 Agric. Dec. 390 (1966). In this case, it is obvious that if the broker had no authority to "accept the buyer's rejection" then complainant could not be bound by any such acceptance if it occurred.

An examination of all the submissions by complainant in this case reveals that complainant is actually alleging that the broker received notice from Terminal Onion Sets that the seed potato contract was cancelled and failed to convey such notice to complainant. There are numerous problems with this allegation. First, complainant had made no showing that respondent had any legal right to cancel the contract. The failure of the broker to give notice of the cancellation, assuming there was such a failure, would not abrogate complainant's right to proceed against Terminal Onion Sets to enforce the contract or for breach of contract. The only possible consequence adverse to complainant which could have resulted from a failure by respondent to convey a message of cancellation would be in the nature of precluding complainant from making an early cover sale so as to minimize any losses which might occur from subsequent market decline. However, complainant's allegations in this case concerning its damages are based on the difference between the original contract price and the proceeds realized by its supplier from the resale of the seed potatoes on some unspecified date prior to June 6, 1985. Thus, complainant has failed to demonstrate damages flowing from the only cause of action which it could have alleged in this proceeding. The complaint should be dismissed.

It should be noted that while complainant maintained forcefully that respondent failed to give notice of the cancellation, respondent maintained just as forcefully that it did give such notice and that complainant acquiesced in such notice. We have deemed it unnecessary to make any determination in regard to this factual issue.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

VICTOR JOSEPH & SON, INC. v. J. R. FRENI COMPANY, INC.

PACA Docket No. 2-7061.

Decision and Order issued October 14, 1987.

F.O.B. suitable shipping condition warranty.

Complainant sold respondent a load of grapes on an F.O.B. basis which were described as having "two or three, maybe up to or as high as 4% decay." It was held that grapes sold under such terms which arrived at contract destination with an average of 4% decay were not abnormally deteriorated.

George S. Whitten, Presiding Officer.

Complainant, pro se.

Frank W. Charles, Chelsea, Massachusetts, for Respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,642.28 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant and asserting a counterclaim in the amount of $2,134.52 arising out of the same transaction. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor the counterclaim exceeds $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Victor Joseph & Son, Inc., is a corporation whose address is P.O. Box Fresh Fruit, Palisades Park, New Jersey. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent, J. R. Freni Company, is a corporation whose address is 34 Market Street, Everett, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about April 16, 1985, complainant sold to respondent one truckload containing 1,920 lugs of Thompson seedless grapes at $12.25 per lug, f.o.b. shipping point in Philadelphia, with destination respondent's place of business in Everett, Massachusetts. It was agreed between the parties at the time of sale that the following description would apply to the grapes: medium berries, occasional large, medium bunches and green. Some decay. Some bunches with one, maybe two, berries brown and occasionally one bunch in some lugs would show three to four and occasionally up to five berries brown. Two to three, maybe up to or as high as 4% decay. Shatter minimal.

4. The grapes were shipped on April 17, 1985, at 11:30 a.m. from loading point in Philadelphia to respondent in Everett, Massachusetts, and arrived at respondent's place of business at 6:00 a.m. on April 18, 1985.

5. On April 18, 1985, at 1:40 p.m., the grapes were federally inspected while still on the truck with the following results in relevant part:

> Temperature of Product: 40 to 42°F.
> Size: Bunches mostly medium, many large. Berries mostly medium, some large, some small. Practically no undersize.
> Quality: Berries mostly light green, some turnin (sic) amber. Bunches mostly compact, some fairly compact. Grade defects average 1% scars.
> Condition: Berries are generally firm and firmly attached to capstems. Stems light green to turning brown, some dry and pliable. From 3 to 13%, average 7% shattered berries. Serious damage by internal brown discoloration ranges in most samples 1 to 4%, many none, average 2%. Average 1% serious damage by wet and sticky berries. Decay ranges 1 to 8%, average 4% Gray Mold Rot in various stages.
> Grade: Meets quality requirements but fails to grade U.S. No. 1 Table only account of condition.
> Remarks: Inspection and certificate restricted to product in 13 pallets nearest rear doors inspected during process of unloading.

6. Sometime late on the afternoon of April 18, 1985, respon communicated to complainant its intention of rejecting the grapes unle price adjustment could be negotiated. Complainant contacted the impo of the grapes and, on April 19, 1985, communicated its final decisio respondent not to grant any price adjustment. Respondent then proce to resell the grapes for the account of whom concerned and on May 7, 1 issued an accounting which showed a breakdown of the gross amount rece from the sale of various lots of the grapes but did not show the date which the sales were made. Gross proceeds on the accounting were sho $15,023.20. From this amount was deducted a charge for inspection in amount of $42.00, freight in the amount of $850.00, and a commission ir amount of $2,253.48, leaving net proceeds of $11,877.72 which were pai complainant.

7. The formal complaint was filed on September 11, 1985, which within nine months from the time the cause of action herein accrued.

Conclusions

The parties agree that the grapes were sold at a discount when the contract was entered due to the presence of decay. Complainant maintains that the discount was $2.00 per carton, and respondent maintains the discount was $1.00 per carton. We do not deem it necessary to decide this issue, although we note that complainant alleged that there was only a $1.00 discount in its rebuttal to respondent's answer.

Complainant maintains that when the verbal contract was entered into on the telephone, it was specified that the grapes would have 4% decay. Complainant asserts that anyone in the produce industry should have interpreted this as meaning 4% average decay. Respondent, on the other hand, maintains that the grapes were represented as having a range of decay up to 4%. We have adopted the characterization of the contract set forth by the broker, Scott & Allen, of Everett, Massachusetts, as correctly setting forth the terms of the contract agreed upon by the parties. We think that the descriptive words related by the broker - "He said two or three, maybe up to as high as 4% decay," might reasonably have been interpreted by respondent as describing a range of decay rather than referring to possible average amounts of decay. However, even if we adopt this interpretation and conclude that the parties intended to agree to a range of decay from "two or three maybe up to or as high as 4%," the federal inspection of the grapes at destination does not show a breach on the part of complainant of such terms. It is clear that the grapes were sold on a f.o.b. basis. Whether it referred to a range or an average, the contract between complainant and respondent specifically provided for grapes with excessive decay. It is well known that grapes with a range of from two or four percent decay could have an average of from two to four percent decay. Even if we assume that it is most likely that grapes with such a range would have only three percent average decay at the time the contract was entered into, good delivery under the suitable shipping condition warranty applicable in f.o.b. sales would allow an average of four percent or more decay at destination. *See Interharvest v. J. Zerillo, Inc.*, 33 Agric. Dec. 354 (1974).

Respondent also complains that no mention was made by complainant of discoloration at the time the contract was made. However, we deem the reference to "brown berries" and "occasionally up to five berries brown decay" as a reference to discoloration. The amount of shattered berries shown by the federal inspection at destination is not inconsistent with a description of matter being minimal at time of shipment. This is clearly shown by respondent's own witness, Hans Zutter, Professor of Horticulture at Temple University, who stated in a letter attached to respondent's answer, that the amount of shattered berries shown by the April 18, federal inspection was within the range of what could be expected during the transit period. We conclude from all of the evidence that no breach of contract on the part of complainant has been established by respondent.

Since respondent accepted the grapes, respondent is liable to complainant for the full purchase price thereof, or $23,520.00. Respondent has already paid complainant $11,877.72, which leaves a balance still due and owing to complainant of $11,642.28. Respondent's failure to pay complainant such

amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim should be dismissed.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $11,642.28, with interest thereon at the rate of 13% per annum from May 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

In re: KARL'S FARM v. ORGANIC FARMS, INC.
PACA Docket No. 2-7076.
Order issued October 7, 1987.

Stay Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an order was issued on August 14, 1987, awarding reparation to the complainant in the amount of $8,546.80. By petition received September 14, 1987, respondent has moved that this matter be reconsidered.

Accordingly, the order of August 14, 1987, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the respondent's petition.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

KING SALAD AVOCADO CO., INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5871.
Order issued October 5, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

KING SALAD AVOCADO CO., INC. v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6182.
Order issued October 7, 1987.

Order issued by Donald A Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed August 1, 1983, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

LAMANTIA-CULLIUM-COLLIER & CO., INC. v. WAYCO CORP., a/t/a AMERITEX PRODUCE.
PACA Docket No. 2-7636.
Order issued October 1, 1987.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $29,661.00 in connection with shipments of asparagus in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including indebtedness to complainant. However, respondent claimed that the amount of indebtedness had been reduced to $16,700.00. Complainant was given an opportunity to dispute respondent's claim that the indebtedness had been so reduced and failed to do so. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.8(d)).

Complainant, La Mantia-Cullum-Collier & Co., Inc., is a corporation whose address is P.O. Box 599, Weslaco, Texas. Respondent, Wayco Corp., a/t/a Ameritex Produce, is a corporation whose address is 2151-A N.W. 72nd Avenue, Miami, Florida. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order, with the exception that the amount of indebtedness has been reduced to $16,700.00. On the basis of these facts, we conclude that the

been reduced to $16,700.00. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $16,700.00. Accordingly, within 30 days from the date of this order, respondent shall pay tc complainant, as reparation, $16,700.00, with interest thereon at the rate of 13 percent per annum from January 1, 1987, until paid.

Copies of this order shall be served upon the parties.

La VERNE CO-OPERATIVE CITRUS ASSN. v. MENDELSON-ZELLER CO., INC.

PACA Docket No. 2-7104.
Decision and Order issued October 14, 1987.

Agency--liability of sales agent for alleged poor performance in selling of perishables.

Complainant alleged that its sales agent made little or no effort to realize market prices in effecting sales on complainant's behalf. It was held that complainant failed to substantiate its allegations in regard to most of the produce in question even though prices shown by market reports were higher than amounts realized from respondent's handling of the produce. However, in this case of produce sold by respondent on a price after sale basis, it was found that respondent failed to furnish adequate justification for its agreement after sale to accept prices substantially lower than those shown by applicable Market News Service reports.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $16,328.13 in connection with the shipment in interstate commerce of four truckloads of lemons.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000, the parties have waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in this case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, La Verne Co-operative Citrus Association, is corporation whose address is 138 South Second Avenue, Upland, Californi

2. Respondent, Mendelson-Zeller Co., Inc., is a corporation whose addre is 450 Sansome Street, San Francisco, California. At the time of th transactions involved herein respondent was licensed under the Act.

3. On November 10, 1981, complainant and respondent entered into written contract whereby respondent undertook to become complainant "Shipping Agent." The contract provided in relevant part as follows:

> 1. LA VERNE hereby grants a MZ CO. the exclusive right to sell and handle crops of lemons packed by LA VERNE for fresh distribution (hereinafter "the crop"), for the 1981-1982 season and which right shall continue for each season thereafter unless this contract is terminated as hereinafter set forth. In the event either party desires not to continue this Agreement, the party wishing to discontinue the selling agreement may terminate this Agreement by giving sixty (60) days notice in writing to the other party. Upon such a termination of this agreement, MZ CO. shall complete all pending sales under this agreement and shall account to LA VERNE in accordance with the terms of Paragraph 4 of this agreement. . . .
>
> 2. The sale of the crop shall be handled by MZ CO. on a consignment basis, except as may be otherwise agreed to in writing.
>
> 3. MZ CO. shall be entitled to and shall be paid a selling commission of twenty cents (20¢) per carton of packed lemons, for all lemons sold for consumption in the United States and Canada, . . . In the event MZ CO. sells through a broker, all brokerage charges paid by MZ CO. will be charged to LA VERNE as a cost of sale, and MZ CO. shall be reimbursed therefor.
>
> 4. Accountings by MZ CO. on all of the crops sold by it shall be made to LA VERNE on an individual sale basis. MZ CO. will send reports of sale to LA VERNE for each shipment of the crop no later than the day after sales are made, to be followed by a copy of an account of sale within a reasonable time after the shipment has been delivered and accepted. It is understood the reports of sale only indicate the sale price at the time of shipment and is subject to later adjustments. Payments shall be made periodically after the account of sales have been made by grouping payments to a series of account sales. MZ Co. shall attempt to make payments in this method every two weeks. . . .
>
> 7. Although it is MZ Co. policy to sell the crop on an F.O.B. basis, it is understood that MZ Co. will also have the right to sell on a delivered basis and through joint accounts with Eastern Receivers by reconsignment and through auctions. On all sales sold on other than an F.O.B. basis, MZ Co. shall charge to LA VERNE and repay itself by deducting from accountings, in addition to its selling charges, all costs incurred in connection with getting the shipment to destination, including freight, cartage, refrigeration, inspection and any other costs that MZ Co. must pay. For sales by reconsignment or auction, MZ Co. will also charge to LA VERNE and deduct all Eastern Commissions and auction charges.
>
> 8. MZ Co. moves a large amount of produce on mixed trucks. Occasionally, these mixed trucks are sold on a delivered basis. The development of the freight charges is difficult, since in many instances, the freight is computed as one sum for the truck itself. In order to

simplify returns on such sales, MZ Co. will return on an F.O.B. basis in line with the market at time of shipment, and the sale will be treated as an F.O.B. sale rather than as a delivered sale.
9. MZ Co. shall sell and distribute all of the crop for such prices and on such terms and conditions as it may deem to be for the best interest of LA VERNE, but in no event is this Agreement to be deemed or construed as a purchase of said crop by MZ Co. or as a guarantee of any specific price. MZ CO. shall be the sole judge of when and to whom and for what price the said crop shall be sold and shall not be liable for any errors in judgment. MZ Co. is authorized to make whatever adjustment, or claim any allowances that it, in its sole discretion, deems justifiable and necessary in order that sales may be consummated at destination in a manner acceptable to a buyer.
MZ CO. is hereby authorized to file, prosecute and settle, all claims for any portion of the crop lost or damaged in transit as it deems appropriate. . . .

LA VERNE agrees to any downward price adjustment or a reduction in the quantity of the crop delivered as agreed to by MZ Co. with buyers, and specifically waives the right to inspection or the requirement of an inspection as set forth in Section 56280 of the Food and Agriculture Code of the State of California. . . .

4. On August 1, 1984, complainant, pursuant to the terms of the above quoted agreement, notified respondent that effective October 1, 1984, they were exercising their right to terminate their contract with respondent.

5. On or about the following dates respondent, acting as complainant's agent under the agreement set forth in finding of fact 3, caused the following shipments of lemons to be made under terms and with the results as set forth below:

9-14-84 Invoice No. 46734
Through L & M, Raleigh, N.C.:
192 ctns. Talk of Town Choice 165s @ $7.50 del. to Family Produce, Durham, N.C.
100 ctns. Talk of Town Choice 165s @ $7.50 del. to Thomas Bros., Greensboro, N.C.
75 ctns. Talk of Town Choice 200s @ $7.00 del. to Park & Shop, Charlotte, N.C.
123 ctns. Talk of Town Choice 165s @ $7.00 del. to Park & Shop, Charlotte, N.C.

To Tom Lange, Atlanta, Ga:

142 ctns. Price of La Verne	200s	price after sale - final price	$6.80 del.
154 ctns. Talk of Town Choice	235s	" " " - " "	5.50 del.
214 ctns. " " " "	200s	" " " - " "	5.00 del.
100 ctns. " " " "	165s	" " " - " "	5.00 del.

9-15-84 Invoice No. 46923
To Ben Schwartz, Detroit, MI: to be sold at auction
200 ctns. Creme de Menthe 140s - $7.30 gross proceeds.

132 ctns.	"	"	"	"	- 7.25	"	"
150 ctns.	"	"	"	165s	- 5.05	"	"
384 ctns.	"	"	"	"	- 5.00	"	"
51 ctns.	Talk of Town			115	- 10.00	"	"
171 ctns.	"	"	"	140	- 6.50	"	"

9-21-84 Invoice No. 47395
To G. & T., N.Y., N.Y.
426 ctns. Pride of La Verne 200s @ $9.50 del., less allowance, $8.95 del.

6. Respondent paid complainant on the basis of the proceeds realized a set forth in finding of fact 5 above, after deducting appropriate commissions freight, and expenses.

7. An informal complaint was filed on May 30, 1985, which was withi nine months after the causes of action alleged herein accrued.

Conclusions

Complainant claims that respondent "violated the spirit of the contract between the parties "in that they made little or no effort to fulfill thei obligation under the terms of the contract which state that they will mak every effort to obtain the best possible price for the product." Complainan stated in the formal complaint that prior to receiving notice on August 1 1984, that the contract was being terminated, respondent's "sales wer reasonably near the typical market price, in the area the product was sold. Complainant further stated that "after the notice of withdrawal was poste Mendelson-Zeller Co., Inc. sales, as indicated by the attached accountings an other documents, were far below the typical sale in the areas in which th product was sold." Complainant submitted Market News Service reports a well as examples of some sales of lemons by Sunkist for the time frame i question. In addition complainant submitted a table showing difference between alleged market prices and its net proceeds totalling $16,328.13.

The contract between the parties established an agency relationship unde which respondent would account to complainant on a consignment basis fo all the produce which respondent handled. However, respondent was give wide latitude as to how it would sell complainant's produce, and while it wa contemplated that a majority of the sales would be on an F.O.B. basis, it wa also provided that the produce could be sold on a delivered basis, join account basis, by reconsignment, and through auction sales. None of the sale with which we are concerned in this proceeding was on an F.O.B. basis Respondent's explanation for this was never rebutted by complainant. Such explanation was as follows:

> Lemons are shipped from California under a prorate system whereby each packing house is allotted a certain number of cartons that each packing house can ship during a week's period. Generally if a packing house does not ship the prorate allotted, the amount not shipped is lost. It is, therefore, important that if on Friday or Saturday prorate is unused by a packing house, consideration be given to rolling fruit unsold in order not to lose the prorate.

Respondent then goes on to explain that it was necessary to sell some of the fruit under invoice no. 46734 on a price after sale basis and to consign the fruit under invoice no. 46923 to be sold at auction.

Complainant does not allege any inaccuracy in respondent's reporting of sales nor in the reporting of sales by respondent's consignees. Complainant merely alleges that the differences between the amounts realized through respondent's sales and the market prices shown by Market News Service reports as well as alleged market prices shown by sales made through Sunkist demonstrate that respondent made little or no effort to obtain market prices for the shipments in question and, in fact, sold the product at prices well below the market at the time.

The Market News Service reports submitted by complainant to cover the lemons shipped under invoice no. 46734 to North Carolina show sales for Wednesday, September 19, 1984, for fair quality (choice) 165s at $12.00 and 200s at $11.00. This is a price difference of $4 to $5 per carton. However, the market report used by complainant was for Jessup, Maryland. While this may have been the closest market for which reports were available we were very reluctant to use such reports to call into question sales made to North Carolina. In addition, the report shows sales prices for September 19, whereas the sales were made on a delivered basis on September 14, 1984. The produce under the same invoice which went to Tom Lange, in Atlanta, Georgia, on a price after sale basis was finalized at delivered prices of $5 to $6.80 per carton. The Atlanta Wholesale Fruit and Vegetable Report for Wednesday, September 19, 1984, shows 140 to 135 size second label lemons at $14.50 to $15.50 per carton, 200 size at $12 to $13 per carton, and 235 size $10.50 to $11.50 per carton. These prices are certainly substantially higher than the prices agreed upon between respondent and Ton Lange after sale in Atlanta. Respondent offered various speculations as to why the agreed delivered prices were so far below the prices reflected by the Market News Service report, however, there is no evidence that any of the explanations apply. There is no allegation in this proceeding that either Mendelson-Zeller or its customers engaged in any fraudulent or unethical practices in regard to the sales of any of the lemons. Complainant even refrains from alleging that Mendelson-Zeller "specifically violated the terms of their contract", and instead alleges that "they violated the spirit of the contract in that they made little or nor effort to fulfill their obligation under the terms of the contract which state that they will make every effort to obtain the best possible price for the product." Later in the proceedings complainant pointed out the section of the contract (paragraph 8) which states "MZ Co. will return on F.O.B. basis in line with the market at time of shipment. . ." However, context of this statement concerns the sale of mixed truckloads in wh respondent elects to sell on a delivered basis, and the consequent proble connected with allocating freight charges to the various portions of the loa It does not amount to a guarantee that returns will be based on F.O.B. mark prices at time of shipment as complainant seems to imply. It is certainly implied provision of any contract under which one person sells for anot

that the person acting as selling agent will attempt to get the best prices for the sales.

Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. Mendelson-Zeller was a company chosen by complainant to act as complainant's agent. Complainant specifically gave Mendelson-Zeller the widest possible latitude in acting as such agent. Thus the provisions of section 9 of the contract between the parties state in part ". . . in no event is this Agreement to be deemed or construed as a purchase of said crop by MZ Co. or as a guarantee of any specific price. MZ Co. shall be the sole judge of when and to whom and for what price the said crop shall be sold and shall not be liable for any errors in judgment." Although the parties made the above quoted conditions explicit in their written contract such conditions are always implicit in such agency contracts in any event. We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight. However, in this case the sale as between Mendelson-Zeller and Tom Lange was on a "price after sale" basis. Under this term the receiver (Tom Lange) is expected to resell the merchandise after arrival and then the receiver and the seller are expected to agree upon a price in the light of the prices realized by the receiver. This type of transaction is quite different from a consignment transaction in which the receiver never takes title to the goods, but sells them on behalf of the shipper and returns to the shipper the proceeds realized from the sale less expenses. A "price after sale transaction" is a sale in every sense of the word, only the price is left "open". The Uniform Commercial Code (U.C.C. § 2-305) provides that where under an open price term the parties fail to agree to a price, the price will be a reasonable price at the time for delivery. In the absence of evidence to the contrary we commonly fix a reasonable price in terms of applicable Market News Service prices. In this case respondent furnished us with no evidence as to the proceeds realized by Tom Lange Company from its sales of the lemons. We only know that for some reason, not disclosed, respondent agreed with Tom Lange after such sales to a final price that ranged from approximately 1/3 to 1/2 of the prices shown by the Market News Service report for the date on which the sales should have been made. We think that in spite of the wide latitude accorded to an agent in the position of respondent, the burden rests upon Mendelson-Zeller to come forward with a plausible justification for its agreement with Tom Lange to accept such low prices. In the absence of other evidence we will utilize the lowest prices shown by the Market News Service report as the prices which should have been realized from the sale of the lemons to Tom Lange. We find that complainant is entitled to an additional $3,506.40 from the sale of such lemons. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

The lemons which were shipped under invoice no. 46923 to Ben Schwartz, in Detroit, Michigan, were sold at auction. There was considerable argument between the parties as to whether complainant was informed prior to shipment that these lemons would go to auction. However, we consider this to be irrelevant since respondent clearly had authority under the contract with

complainant to sell the lemons at auction. The Market News Service report for Detroit, Michigan, on September 19, 1984, reports sales of California lemons but does not give any indication as to the quality to which such quotations apply. The report indicates that size 115s were selling for $15.00 per carton, size 140s for $13-$14, and size 165s for $8-$11 per carton. The auction sales were also substantially lower than the prices indicated by the Market News Service reports. However, in this case we have the actual accounting of Ben Schwartz showing the gross proceeds realized from the auction sales. Again there is no allegation of any fraudulent or unethical activity in connection with such sales. It is very difficult to argue with the results of sales at auction. In spite of the difference between the proceeds of such sales and the prices indicated by the Market News Service report we do not intend to argue with such results in this case.

The remaining 426 cartons of lemons were shipped on September 21, 1984, under invoice no. 47395 and sold on a delivered basis to G & T Produce in New York, New York. The original sale price was $9.50 delivered. Respondent states that the lemons arrived late and it granted an allowance of $1 per carton to G & T. Respondent secured a contribution from the trucker in the amount of $.45 per carton to cover a part of this allowance, and charged the remaining $.55 of the allowance to complainant. Complainant supplied Market News Service reports for the New York City Hunts Point Terminal Market on Tuesday, September 25, 1984. Such reports do not show any quotations for 200 size California lemons. In addition such reports do not cover delivered prices for the September 21, 1984, date of sale. We find that complainant has failed to show that it is due any further compensation from respondent for these lemons.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $3,506.40, with interest thereon at the rate of 13% per annum from October 1, 1984, until paid.

Copies of this order shall be served upon the parties.

LUSK ONION COMPANY v. RAFIC S. THOME, d/b/a RST DISTRIBUTING COMPANY.
PACA Docket No. 2-7669.
Order issued October 21, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against

complaint was filed in which complainant seeks a reparation award against respondent in the amount of $6,142.50 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.8(d)).

Complainant, Lusk Onion Company is a partnership whose address is 570 Mabry Drive, Clovis, New Mexico. Respondent, Rafic S. Thome, is an individual doing business as RST Distributing Company whose address is Box 783, Edinburg, Texas 78539. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the forma complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $6,142.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $6,142.50, with interest thereon at the rate of 13 percent per annum from February 1, 1987, until paid.

Copies of this order shall be served upon the parties.

MARTORI BROS. DISTRIBUTORS v. KALECK DISTRIBUTING CO.
PACA Docket No. 2-7672.
Order issued October 28, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely formal complaint was filed on May 8, 1987. Complainant seeks to recover $9,654.60 which amount is alleged to be the total purchase price for cantaloupes sold to and accepted by respondent on July 16 and 17, 1986. Respondent filed an answer to the formal complaint on September 18, 1987, admitting that $3,187.70 of the amount claimed by complainant was due and owing to complainant on account of the transaction(s) involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

> If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondent shall pay to complainant, as an undisputed amount, $3,187.70. Payment of this

amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from August 1, 1986, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondent's liability for payment of the undisputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

JEROME M. MATTHEWS d/b/a MATTHEWS GROVES v. QUONG YUEN SHING & CO.
PACA Docket No. 2-7333.
Decision and Order issued October 14, 1987.

Failure to reject produce is acceptance--Acceptance of produce obligates the buyer to pay full purchase price, less any allowances due it.

Buyer purchased longnans, an Oriental tree fruit, from complainant. Respondent did not specifically reject the fruit upon the receipt, apparently believing that holding the fruit for inspection would be sufficient defense. Held for complainant for full amount.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of seven (7) loads of longnans, an oriental fruit, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer denying liability and claiming a breach of warranty by complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is, therefore, applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of this case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed a statement in reply.

Findings of Fact

1. Complainant is an individual doing business as Matthews Groves whose address is 5365 S.W. 78th Street, Miami, Florida 33143. At the time of the transactions involved herein, complainant was not licensed under the Act.

2. Respondent is an individual doing business as Quong Yuen Shing & Co. and whose address is 32 Holt Street, New York, New York 10013. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On August 6, 1985, complainant, by oral contract, sold respondent 58 25-pound crates of longnans, an Oriental fruit and a perishable agricultural commodity at $2.50 per pound, for a total invoice value of $3,625.00. The longnans were loaded at Miami, Florida. The fruit was received and accepted by respondent at his address in New York City.

4. On August 8, 1985, complainant, by oral contract, sold respondent 61 25-pound crates of longnans, at $2.50 per pound, for a total invoice value of $3,812.50. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

5. On August 9, 1985, complainant, by oral contract, sold respondent 67 25-pound crates of longnans, at $2.50 per pound, for a total invoice value of $4,187.50. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

6. On August 12, 1985, complainant, by oral contract, sold respondent 39 25-pound crates of longnans, at $2.50 per pound, for a total invoice value of $2,437.50. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

7. On August 23, 1985, complainant, by oral contract, sold respondent 53 25-pound crates of longnans, at $2.25 per pound, for a total invoice value of $2,437.50. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

8. On August 27, 1985, complainant, by oral contract, sold respondent 52 25-pound crates of longnans, at $2.10 per pound, for a total invoice value of $2,782.50. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

9. On August 29, 1985, complainant, by oral contract, sold respondent 12 25-pound crates of longnans, at $2.10 per pound, for a total invoice value of $630.00. The longnans were loaded at the loading point in the State of Florida. The fruit was received and accepted by respondent at his address in New York City.

10. To date, respondent has paid a total of $12,315.00 on the transactions set forth in paragraphs 3-9 above, leaving a balance of $8,141.25.

11. The transactions set forth in paragraphs 3-9 were f.o.b. transactions.

12. An informal complaint was filed with the Department on February 28, 1986, which was within nine (9) months of when the causes of action stated herein accrued. A formal complaint was filed on June 3, 1986.

Conclusions

Respondent made partial payment with respect to the seven loads of longnans. Respondent's answer set forth defenses to his non-payment of the remaining balance, claiming substantial weight shortages in the crates as well as wet fruit which was beginning to develop mold. Respondent presented no evidence in the form of state or federal inspection, to verify his defenses, nor was any state or federal inspection of the fruit apparently made.

Respondent was apparently under the mistaken assumption that if a dispute arose as to the produce all he was required to do was hold the produce for inspection by federal inspectors or complainant. Such is not the case.

There is no evidence that respondent rejected or did not accept the produce when it was tendered to respondent. Once the produce was received and accepted by respondent, he became obligated to complainant for the full contract price less damages sustained as a result of any breach of contract by complainant, and less credit for money paid and any allowance due it. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The full contract price for the seven loads of fruit was $20,456.25. Respondent has paid $12,315.00. Complainant has not agreed to any credits, nor has respondent presented any specific evidence of credits due or for allowance which should be given.

We hold, therefore, that respondent's failure to pay complainant $8,141.25 is a violation of section 2 of the Act for which reparation, plus interest, should be awarded.

Order

Within thirty (30) days from the date of this order, respondent shall pay to complainant, $8,141.25, with interest thereon, at the rate of 13 percent per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RICHARD AND DARLENE MATTNER d/b/a MATTNER FARMS v. TERRIFIC TOMATO CO.
PACA Docket No. 2-7388.
Order issued October 28, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely

complaint was filed in which complainant seeks reparation against respond in the amount of $223,599.75 in connection with numerous transacti involving the shipment of tomatoes in interstate commerce.

A copy of the formal complaint was served upon respondent. By le dated September 24, 1987, complainant notified the Department that they chosen to file a complaint in the United States District Court for the Wes District of Michigan against the respondent, as well as two other part concerning the tomatoes which also are the subject matter of this reparat proceeding. Complainant, aware that under the Act they had such a cho of remedies but also aware that we would not continue to entertain th reparation complaint after they chose to file a district court complaint, in the letter of September 24, 1987, authorized dismissal of their reparat complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

YATARO MINAMI d/b/a H. Y. MINAMI & SONS v. ARIZONA FRES FOODS, INC.
PACA Docket No. 2-5896.
Order issued October 5, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent' bankruptcy. Having heard nothing further, the Presiding Officer suggested tha the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

MURAKAMI FARMS, INC. v. MORRIS LEGRANT, d/b/a CLEVELAND FRUIT MARKET.
PACA Docket No. 2-7645.
Order issued October 21, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $3,378.75 in connection with the shipment of two trucklots of onions in interstate commerce. A copy of the formal

complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant, but alleging that the parties had entered into a settlement agreement. In view of the latter claim, complainant was served with a notice to show cause why its complaint should not be dismissed. In its reply to that notice to show cause, the complainant stated that, although it had agreed to respondent's payment of his indebtedness on a schedule, except for the first payment, the respondent has failed to make any payments. Both parties do agree, however, that respondent has paid complainant $638.00 of the total $3,378.75 indebtedness which leaves a balance due complainant of $2,740.75. As respondent has failed to comply with his agreement with the complainant to pay off his indebtedness pursuant to a schedule, we find that the only defense stated in his answer has no merit. *See Constantino v. Barsi*, 25 Agric. Dec. 662 (1966). Moreover, as noted above, respondent has admitted all the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.8(d)).

Complainant, Murakami Farms, Inc., is a corporation whose mailing address is P.O. Box 9, Ontario, Oregon 97914. Respondent, Morris Legrant is an individual doing business as Cleveland Fruit Market whose address is 400 South Street, Cleveland, Mississippi 38732. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $2,740.75. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,740.75, with interest thereon at the rate of 13 percent per annum from October 1, 1986, until paid.

Copies of this order shall be served upon the parties.

NORDEN FRUIT CO., a/t/a CAL FRUIT v. C&D FRUIT & VEGETABLE CO., INC.
PACA Docket No. 2-6974.
Order issued October 28, 1987.

Order issued by Donald A Campbell, Judicial Officer.

ORDER DISMISSING PETITION FOR RECONSIDERATION

On October 5, 1987, respondent filed a petition for reconsideration of the Decision and Order filed by the Judicial Officer on September 11, 1987, in this proceeding. The questions raised by respondent's petition have been sufficiently considered in the issuance of the September 11, 1987, Decision and Order and therefore, respondent's petition for reconsideration is dismissed.

Within thirty days from the date of this order, respondent sh amount due by the terms of the September 11, 1987, Decision a

Copies of this order shall be served upon the parties.

PBU ENTERPRISES a/t/a QUALITY DISTRIBUTING OF CA v. CAL-MEX DISTRIBUTORS, INC.
PACA Docket No. 2-7206.
Order issued October 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

On July 28, 1987, a Decision and Order was issued, in this r proceeding under the Perishable Agricultural Commodities Act, amended (7 U.S.C. § 499a *et seq.*), dismissing the complaint. On A 1987, 31 days later, the complainant filed a motion requesting reconsi

Section 7(c) of the Act, 7 U.S.C. § 499g(c), requires that appe reparation decisions be filed with the appropriate district court withi from the date of the issuance of an order. After that time, the distri lose jurisdiction to hear such appeals. *American Fruit Grow. v. J Goldstein F&P Corp.*, 78 F. Supp. 309 (E.D. Pa. 1948). In view of t the thirtieth day from the date of issuance of a decision, the Secret lacks jurisdiction to affect the previously issued order.[3] Acc complaint's petition must be, and hereby is, dismissed without prior upon the respondent.

In any event, the matters raised by complainant in its motion we considered when the July 28, 1987 Decision and Order was pr Therefore, its motion would have been dismissed in any event.

Copies of this order shall be served upon the parties.

PEMBERTON PRODUCE, INC. V. TOM LANGE COMPANY, INC
PACA DOCKET NO. 2-7151.
Decision and Order issued October 13, 1987.

Change in contract terms--Breach of warranty--Abnormal transportation cond Accounting--Warranty of merchantability.

Regarding shipment A, complainant's grant of protection was conditioned on the inspection confirming initial informal opinion as to pulp temperatures of the lettuce.

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[3]The rules of practice require that petitions for reconsideration be filed within ten of the date of service of a Decision and Order. *See* 7 C.F.R. § 47.24(a). However, be we are without jurisdiction to consider it at all, we need not consider here whether we have considered complainant's motion on its merits had it been filed between the eleven after service and the thirtieth day after issuance.

federal inspection did not confirm the informal opinion. Therefore, the grant of protection was void and the original contract terms were still in effect. There was no breach of warranty by complainant and, further, transportation conditions appeared to be normal. Regarding shipment B, respondent properly accounted for the produce purchased from complainant with the contract changed to reflect complainant's grant of protection With respect to shipment C, lettuce damaged by 25% seedstems found to be merchantable.

Andrew Y. Stanton, Presiding Officer.
Thomas R. Oliveri, Newport Beach, California, for complainant.
LeRoy W. Gudgeon, Esq., Northfield, Illinois, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $13,402.00 in connection with the sale to respondent of three loads of lettuce in interstate commerce. The complaint has subsequently been amended, reducing the amount claimed as damages to $5,861.35

Copies of the reports of investigation prepared by the Department were served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability. Respondent later field a counterclaim for $810.00, concerning the subject matter of the complaint. Complainant did not file a reply to the counterclaim.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the reports of investigation are considered part of the evidence, as are the verified complaint and answer. The parties were given the opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement, respondent an answering statement, and complainant a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, Pemberton Produce, Inc., is a corporation whose address is P.O. Box 5361, Salinas, California. At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P.O. Box 4701, Springfield, Illinois. At the times of the transactions alleged in the complaint, respondent was licensed under the Act.

3. On approximately May 9, 1985, complainant sold to respondent 720 cartons of Fatsoo brand lettuce at $3.00 per carton plus $.65 per carton for cooling and $22.50 for Ryan recorder, for a total contract price of $2,650.00, f.o.b. (hereinafter, "shipment A"). The contract specified that no grade was to be in effect. Good delivery standards were to apply, excluding bruising and discoloration following bruising. The contract provided for shipment to respondent's customer in Atlanta, Georgia.

4. The lettuce of shipment A was loaded for shipment in interstate commerce to Atlanta, Georgia. Complainant prepared a bill of lading showing the contract destination as Atlanta, Georgia, and that a temperature range from 34° to 36°F. was to be maintained.

5. On approximately May 14 or 15, 1985, respondent's employee, E. Hoffman, called complainant's sales agent, John Moyer, complaining that when the truck containing shipment A stopped at Birmingham, Alabama, to unload produce originating from another shipper, the receiver in Birmingham had noticed that the pulp temperature of shipment A ranged from approximately 43 degrees to 80 degrees F. Mr. Hoffman and Mr. Moyer discussed the possibility that shipment A had not been properly precooled, but did not arrive at any conclusion as to this issue. It was decided that part of shipment A would be unloaded in Birmingham, with respondent granting protection for loss and labor dependent on the findings of a federal inspection of the remaining cartons, taken when the load finally reached Atlanta. Respondent then unloaded 320 cartons at Birmingham, and shipped the remaining cartons to Atlanta, where they arrived on May 15, 1985, were unloaded, and federally inspected. The inspection found as follows, in relevant part

> INSPECTION LOCATION Receiver's cooler
> TEMPERATURES Range 45 to 51°
> APPLICANT STATES 400 cartons
> PRODUCT: Iceberg LETTUCE in cartons printed "Fat Soo brand Lettuce packed and shipped by Pemberton Produce Co., Salinas, CA., 2 Doz Heads, Produce of U.S.A."
> SIZE: Fairly uniform
> QUALITY AND CONDITION: Average 79% hard or firm 21% fairly firm. No grade defects. Wrapper leaves: Decay averages 4% Head leaves: Damage by Tipburn average 7%. Decay 1 to 8 heads in most cartons, 20 heads in some cartons, average 28%, Gray Mold Rot in generally advanced stage.

6. Respondent's Mr. Hoffman prepared and sent to complainant a Trouble Report on May 18, 1985, which was received by complainant without objection. The Trouble Report states as follows, in relevant part:

> Shipper Pemberton Produce
> Receiver Tom Lange Co. (ATL)
> Date Shipped 5-9-85
> Date Received 5-15-85
> Reasonable Time in Transit Yes [checked]
> Arrival Temperature 43 Top 80° Bottom
> Inspection Buyers Insp: 5-15-85 Temp: Top Ctns 43°, Middle Ctns 53-70° Bottom Ctns 80°. Taken TK. 5-14-85
> Fed. Insp. Temp. 45-51° Cond: Wrapper Leaves Decay avg 4% Head Leaves: damage by Tipburn avg 7% Decay 1-8 heads in most ctns some ctns 20 heads avg 28% decay.
> Received Accepts yes [checked]
> Protection Loss & Labor [checked]
> Consignment [blank]
> Stipulations [blank]
> Shipper Agrees To [blank]

Final Disposition [blank]

7. Respondent never provided a Ryan recorder tape for Shipment A.

8. On June 11, 1985, respondent prepared and sent complainant a check for $931.65 as payment for shipment A. On June 14, 1985, complainant's Mr. Moyer prepared and sent a letter to respondent's Mr. Hoffman, returning the $931.65 check as unacceptable. That letter includes the following language:

> Please recall that on May 15, 1985 you telephoned me to advise that some of the lettuce had been rejected in Birmingham and that you re-consigning same in Atlanta. At that time you reported pulp temperatures ranging from 45 degrees to 80 degrees and that you would keep me informed of the results. This was last verbal discussion we had reference this shipment.
>
> The Federal inspection taken in Atlanta on only 400 cartons indicates temperatures of 45 to 51 degrees. Since your carrier contracted to transport this produce at 34 to 36 degrees and obviously failed to do so, it is our opinion that any adjustments in your delivered price be deducted from the freight charges and not from our invoice. It is obvious that the high level of 28% decay is a result of carrier neglect and not any fault of ours.

The $931.65 was eventually offered by respondent as payment of the ndisputed amount, without prejudice, and accepted by complainant.

9. On approximately October 4, 1985, complainant sold to respondent 800 irtons of Fatsoo brand lettuce at $6.00 per carton plus $.65 per carton for ›oling and $22.50 for a Ryan recorder, for a total contract price of $5,342.50, ›.b. (hereinafter, "shipment B"). The contract specified that no grade was to : in effect. Good delivery standards were to apply, excluding bruising and scoloration following bruising.

10. Shipment B was shipped in interstate commerce to respondent in tlanta, Georgia, who diverted it to its customers in Birmingham, Alabama, lex Kontos Fruit Company, Inc. (hereinafter, "Kontos"), and Associated rocers of Alabama, Inc. (hereinafter, "Associated"). Shipment B arrived in irmingham on October 8, 1985, and 400 cartons were federally inspected ›th at Kontos and Associated. The inspection at Kontos revealed a mperature of 40 degrees F., with no decay in the wrapper leaves, and in the ›ad leaves, four to 12 heads per carton, average 28 percent Bacterial Soft ot in various stages. The inspection at Associated revealed temperatures of 3 degrees F. at the top and 46 degrees F. at the bottom, no decay in the rapper leaves, and in the head leaves, two to ten heads per carton, average 5% Bacterial Soft Rot and Grey Mold Rot in various stages. Upon receiving ıe inspection results, complainant's sales manager, Gary Hart, told ›spondent's employee, Eric Hoffman, that complainant would grant rotection, and respondent should handle the load on consignment.

11. Respondent sold shipment B to Kontos for $4.90 per carton, delivered, ›r a total of $3,920.00. This is indicated on respondent's October 9, 1985, ıvoice to Kontos. From this sum, respondent deducted a handling fee of 120.00 and $2,600.00 for freight, remitting to complainant the difference of 1,200.00. This sum was accepted by complainant as the undisputed amount, ›ithout prejudice to any claim for additional funds.

at its destination. Complainant also states that it authorized respondent t handle the lettuce on consignment for its account. However, complainan disputes respondent's remittance of $1,200.00, claiming that respondent ha never provided an adequate accounting.

Respondent has submitted into evidence an invoice to Kontos Fruit Co, Birmingham, Alabama, to whom it allegedly sold the 800 cartons of lettuce of shipment B. The invoice shows the lettuce was resold for $4.90 per carton totalling $3,920.00 for the 800 cartons. From this figure, respondent deducted $120.00 for handling, which is reasonable, and $2,600.00 for freight, to which complainant has not specifically objected. We conclude that respondent ha provided sufficient proof to support its remittance for $1,200.00 for shipment B, and is without any further liability to complainant for such shipment.

During the course of this proceeding, respondent paid complainant in ful for shipment C, but filed a counterclaim for $810.00, claiming tha complainant breached its contract by failing to inform complainant that the lettuce contained 27 percent damage by seedstems, as found by the October 8, 1985, federal inspection (Finding of Fact 13).

The parties agree that there was no express warranty as to grade given by complainant for shipment C. There was, however, an implied warranty of merchantability, which means that the goods must be at least such as pass without objection in the trade under the contract description, are fit for the ordinary purposes for which such goods are used, and run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved. *Elk Rapids Packing Company v. Neiman Brothers Company*, 30 Agric. Dec. 582 (1971). It is respondent's burden to prove that complainant breached this warranty. We conclude that respondent has failed to do so. Respondent does not deny that the lettuce had considerable value, as it admits liability for $4,599.00 of the $5,409.00 contract price. This alone is an indication that the lettuce was merchantable. Further, the October 8, 1985, federal inspection found the lettuce to be damaged by seedstems in the amount of 27 percent, not seriously damaged. Lettuce can be affected by seedstems in various degrees of severity. We find that respondent has failed to prove that the lettuce was so severely affected by seedstems as to be unmerchantable. Therefore, respondent's counterclaim must be dismissed.

We have found respondent to be liable to complainant for $1,718.85 for shipment A, but free from liability for shipment B. Respondent's counterclaim for shipment C has been found to be without merit. Respondent's failure to pay complainant $1,718.85 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,718.85, with interest thereon at the rate of 1 percent per annum, from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

PLAINVILLE PRODUCE, INC. v. D. LOI & SON NO. TWO, INC.
PACA Docket No. 2-7339.
Decision and Order issued October 16, 1987.

Negative inferences--Evidence--Complainant's failure to rebut respondent's evidence, especially letter from former employee of complainant, raises the negative inference that respondent's defense is accurate.

Complainant claimed a sale of tomatoes to respondent Respondent claimed consignment, and presented a letter from complainant's sales manager which agreed with its position. Held for respondent, except amount respondent still holding.

Allan R. Kahan, Presiding Officer.
Complainant, pro se
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award of $1,163.50 against respondent in connection with the sale of four truckloads of tomatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability and claiming a breach of contract by complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. In addition, the parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Neither party did so.

Findings of Fact

1. Complainant is a corporation whose address is 101 Reserve Road, Hartford, Connecticut. At the time of the transactions involved herein, complainant was licensed under the Act.

2. Respondent is a corporation whose address is 205 Jackson Street, Eaglewood, New Jersey 07631. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On February 11, 1985, complainant, by oral contract, consigned to respondent 180 boxes of "Fancy Pak" tomatoes. These tomatoes were loaded at shipping point and destined for respondent at Hunts Point Market, New York. The tomatoes were received and accepted by respondent.

4. On February 20, 1985, complainant, by oral contract, consigned to respondent 100 boxes of "Fancy Pak" tomatoes. These tomatoes were loaded

at shipping point and destined for respondent at Hunts Point Market, Ne York. The tomatoes were received and accepted by respondent.

5. On March 4, 1985, complainant, by oral contract, consigned t respondent 50 boxes of "Fancy Pak" tomatoes. These tomatoes were loade at shipping point and destined for respondent at Hunts Point Market, Ne York. The tomatoes were received and accepted by respondent.

6 On March 11, 1985, complainant, by oral contract, consigned t respondent 100 boxes of "Fancy Pak" tomatoes. These tomatoes were loade at shipping point and destined for respondent at Hunts Point Market, Ne York. The tomatoes were received and accepted by respondent.

7. Respondent has remitted $2,726.50 to complainant in connection wit the tomato transactions set forth in paragraphs 3 through 6.

8. A formal complaint was filed on August 7, 1985, which was within nin months of when the causes of action stated herein accrued. A revised formal complaint was filed on March 31, 1986.

Conclusions

In its answer, respondent denies the complainant's allegations that the transactions were sales. Respondent claims the transactions were consignments of the tomatoes by complainant. Respondent submits as evidence that the transactions were consignments a letter from Tony Laurence, who was purportedly the Sales Manager of complainant during the period in question. The letter states in clear and certain terms that the parties agreed that the tomatoes were shipped to respondent on a consignment basis, that the unit price shown on the invoice was to be used as a guide line and suggested price; that Mr. Ruffini had agreed that complainant would accept whatever price the tomatoes sold for less 25¢ per box to respondent for their handling. In addition, respondent submitted with its answer an accounting of the four shipments. The figures set forth on the accounting are consistent with all the credible evidence presented. Since complainant had an opportunity to challenge the figures and computations set forth on that accounting but failed to do so, and such accounting has respondent admitting to owing complainant $107.50, such accounting is accepted as being a valid accounting of the four transactions.

Although complainant was given an opportunity to file additional evidence to challenge or rebut the facts and calculations set forth in the letter and the accounting, complainant did not. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted in *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499 (1974). Under the circumstances, the failure of complainant to introduce evidence on this issue gives rise to the strong inference that such evidence would have been adverse to complainant. *See, United States v. Di Re*, 332 U.S. 581, 593; and *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

Given such evidence, we find that the only money due and owing to complainant with respect to these transactions is that which is admitted in respondent's answer, namely $107.50, which equals the remaining balance due from the gross proceeds received, less the handling charge of $.25 per box

assessed by the respondent. The $.25 handling charge was mentioned in Mr. Laurence's letter, to which respondent based its defense.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $107.50, with interest thereon at the rate of 13% per annum, from May 1, 1985, until paid.

Copies of this order shall be served upon the parties.

PRODUCE SPECIALISTS OF SAN DIEGO, INC. v. JON-VEG SALES, INC.
PACA Docket No. 2-7487.
Order issued October 21, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $20,385.00 in connection with the shipment of three trucklots of mixed vegetables in foreign commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, but alleging that only $13,385.00 remained due. Although, under the Act and the Rules of Practice, an order requiring payment of this amount could have been issued, as respondent also alleged that the parties had entered into a settlement agreement permitting it to make monthly payments of $1,500.00 until the ful amount had been paid,[1] complainant was given an opportunity to respond thereto. In its response, complainant denied that there had been such an agreement, and pointed out that, had there been such an agreement and had respondent complied therewith, respondent would have completely paid off the amount due. Complainant, also, noted that some payments had been made and that the amount due had been reduced to $7,385.00. Respondent was given an opportunity to reply to complainant's allegation, and filed a statement agreeing that it owed complainant $7,385.00. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.8(d)).[2]

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[1]If the parties had entered into such an agreement, it would have been proper to dismiss the action

[2]In its reply, respondent asked that the Department establish a payment schedule for it to pay complainant the $7,385.00. However, the Department does not establish, nor does it supervise the operation of, payment schedules

Complainant, Produce Specialists of San Diego, Inc., is a corporat whose mailing address is P.O. Box 568, Chula Vista, California 92 Respondent, Jon-Veg Sales, Inc., is a corporation whose mailing addres P.O. Box 431, Watsonville, California 95077. At the time of the transacti involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findi of fact of this order. On the basis of these facts, we conclude that the actio of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and ha resulted in damages to complainant of $7,385.00. Accordingly, within 30 d from the date of this order, respondent shall pay to complainant, reparation, $7,385.00, with interest thereon at the rate of 13 percent p annum from July 1, 1986, until paid.

Copies of this order shall be served on the parties.

RAIO PRODUCE CO., INC. v. MUNCHY PRODUCE, INC.
PACA Docket No. 2-7140.
Decision and Order issued October 19, 1987.

Delivered sale--Evidence - failure to prove defenses.

Complainant sold respondent various quantities of mixed perishable produce on a delivered basis, and respondent accepted such produce on arrival. Respondent raised several defenses which it failed to substantiate by a preponderance of the evidence. Reparation awarded to complainant for full purchase price of produce.

George S. Whitten, Presiding Officer.
William S. Cappuccio, Esq., Hammonton, New Jersey, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $17,501.65 in connection with the shipment in interstate commerce of various quantities of mixed perishable produce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified complaint is considered a part of the evidence in the case, as is the Department's report of investigation. Respondent's answer, since it was not verified, is not in evidence. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement,

respondent filed an answering statement, and complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Raio Produce Co., Inc., is a corporation whose address is R.D. 6, North Pinewood Drive, Folsom, New Jersey.

2. Respondent, Munchy Produce, Inc., is a corporation whose address is 1265 N.W. 22nd Street, Miami, Florida. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about July 9, 1985, through August 24 1985, complainant sold and shipped from loading point in New Jersey to respondent in Miami, Florida, 14 trucklots of mixed perishable produce at prices totalling $17,501.65 delivered.

4. Respondent accepted the produce upon arrival at destination and has not paid complainant any part of the purchase price thereof.

5. An informal complaint was filed on September 25, 1985, which was within nine months after the causes of action herein accrued.

Conclusions

In its unverified answer, respondent raised several defenses to the formal complaint. First, respondent contended that almost every item of produce was overcharged. Respondent listed a number of specific items which it considered to be in this category together with the amounts which it contended it was overcharged. Complainant addressed each of these specific items in its sworn opening statement and denied that respondent was overcharged on any item. Second, respondent contended that complainant shipped to respondent a number of items which were not ordered. Again, respondent specified some of these items in its answer. In its opening statement, complainant denied shipping any produce which was not ordered and specifically addressed each of the items listed by respondent in its answer. Third, respondent contended that some of the produce which it received was not in good condition. Complainant maintained that all of the produce was in good condition when shipped and respondent failed to substantiate the bad condition of any of the produce by submitting inspections of such produce. Respondent contended that complainant had never required inspections in the past but had simply accepted respondent's word that certain produce shipped was in poor condition. However, it is clear that complainant has not in this instance acquiesced in respodnent's claims that certain portions of the produce arrived in poor condition. Complainant further maintains that it was not given notice at any reasonable time after arrival of the claimed poor condition of any of the produce. We find that this contention by complainant is supported by a preponderance of the evidence.

It is clear that respondent accepted all of the produce. Respondent ha not succeeded in proving any of its defenses by a preponderance of the evidence, and accordingly, respondent is liable to complainant for the full purchase price of the produce which it accepted, or $17,501.65. Respondent's

failure to pay complainant such amount is a violation of section 2 of the for which reparation should be awarded to complainant with interest.

Order

Within thirty days of the date of this order, respondent shall pay complainant, as reparation, $17,501.65, with interest thereon at the rate 13% per annum, from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

RENE PRODUCE DISTRIBUTORS, INC. v. BG ENTERPRISES, INC d/b/a B.G. SALES.
PACA Docket No. 2-6558.
Order issued October 5, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed February 21, 1985, pending completion respondent's bankruptcy. Having heard nothing further, the Presiding Offic suggested that the complaint be dismissed as the matter was, undoubted resolved by the Bankruptcy Court. The complainant was given an opportun to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

SALINAS MARKETING COOPERATIVE v. ARIZONA FRESH FOOI INC.
PACA Docket No. 2-5911.
Order issued October 2, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of responder bankruptcy. Having heard nothing further, the Presiding Officer suggested t the complaint be dismissed as the matter was, undoubtedly, resolved by t Bankruptcy Court. The complainant was given an opportunity to object to t suggestion but did not do so.

Accordingly, the complaint was dismissed.

DALE E. SEAQUIST, d/b/a ORCHARD HILL FARM v. GRO-PRO, INC. and/or FRUIT HILL, INC.
PACA Docket No. 2-6071.
Order issued October 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondents in the amount of $34,872.85 in connection with transactions involving the shipment of cherries in interstate commerce.

A copy of the formal complaint was served on respondents which filed a joint answer denying any liability to complainant. However, before a decision could be issued, the Department was notified that respondent Gro-Pro, Inc., had filed a petition in bankruptcy. Accordingly, on January 5, 1984, this matter was stayed against respondent Gro-Pro, Inc., pending completion of its bankruptcy.[1] Having heard nothing further, on July 14, 1987, the Presiding Officer suggested to complainant that it would be appropriate to dismiss the complaint because the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SHURFINE-CENTRAL CORPORATION v. JAMES GUY d/b/a JIM'S CARTAGE SERVICE.
PACA Docket No. 2-7279.
Order issued October 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER [Continuance]
(Summarized)

This proceeding was continued until the Department receives prope notification that respondent's proceeding now pending in the United State Bankruptcy Court has been closed or dismissed.

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[1]At the same time, respondent Fruit Hill, Inc., was ordered to pay complainant, as reparation, $8,692.81 plus interest as its portion of the respondents' liability for the transactions at issue.

SIX L'S PACKING COMPANY, INC. v. FAVA & COMPANY, INC.
PACA Docket No. 2-6369.
Order issued October 26, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed December 19, 1983, pending completion o respondent's bankruptcy. Having heard nothing further, the Presiding Office suggested that the complaint be dismissed as the matter was, undoubtedly resolved by the Bankruptcy Court. The complainant was given an opportunit to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

SUN-GLO OF IDAHO, INC. v. PRODUCE PRODUCTS, INC.
PACA Docket No. 2-7598.
Order issued October 7, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $53,604.39 in connection with shipments of potatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness to complainant. However, respondent claimed that the amount of indebtedness had been reduced to $37,188.76. Complainant has concurred that the indebtedness has been so reduced. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.8(d)).

Complainant, Sun-Glo of Idaho, Inc., is a corporation whose address is P.O. Box 98, Rexburg, Idaho 83440. Respondent, Produce Products, Inc., is a corporation whose address is 231 E. Imperial Highway, Suite #230, Fullerton, California. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order, with the exception that the amount of indebtedness has been reduced to $37,188.76. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $37,188.76. Accordingly within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $37,188.76, with interest thereon at the rate of 1 percent per annum from March 1, 1986, until paid.

Copies of this order shall be served upon the parties.

SUNSET STRAWBERRY GROWERS v. LUNA CO., INC., a/t/a BAKERSFIELD PRODUCE & DISTRIBUTING CO.
PACA Docket No. 2-7152.
Decision and Order issued October 16, 1987.

Rejection - effective - must be accepted--Burden of Proof - wrongful rejection and abnormal transportation sources and conditions.

Respondent was found to have promptly and unequivocally rejected two loads of strawberries sold on an f.o.b. basis. Complainant was stated to not have the option of rejecting or accepting the rejections. Since the strawberries were effectively rejected complainant had the burden of proof both as to abnormal transportation services and conditions and as the wrongful rejection. Complainant was found to have failed to meet such burdens.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $7,020.40 in connection with the sale in interstate commerce to two truckloads of strawberries.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Sunset Strawberry Growers, is a partnership composed of John Coelho and Alton Allen, whose address is 2165 West Main Street Santa Maria, California.

2. Respondent, Luna Co., Inc., a/t/a Bakersfield Produce & D[illegible] Co., is a corporation whose address is 2901 F Street, Suite B, Bak[illegible] California. At the time of the transactions involved herein respon[illegible] licensed under the Act.

3. On or about May 4, 1985, complainant sold to respondent 2[illegible] of Sunset label strawberries at $3.50 per flat, plus $.65 per flat coo[illegible] palletizing, plus 6 units of Tectrol at $19.00, and a temperature recor[illegible] $22.50, or a total of $10,494.90 f.o.b.

4. On May 4, 1985, at approximately 12:00 p.m., complainant shipp[illegible] strawberries covered by Finding of Fact 3 under its invoice No[illegible] (Respondent's purchase order No. 5521) to respondent's customer, Pick N[illegible] Supermarkets, Inc., in Cleveland, Ohio. The load of strawberries arri[illegible] the place of business of respondent's customer on the morning of May 7, [illegible] At 1:45 p.m., the strawberries were subjected to a federal inspection w[illegible] on the truck. Such inspection was restricted to product and lading in all [illegible] of eight pallets nearest the rear trailer doors and showed temperatures a[illegible] rear doors of "Top 41° F., Bottom 36° F." Condition was stated to be a[illegible] follows:

> Generally ripe and firm and fairly bright to bright in appearance. Damage by bruising ranges from 18 to 70%, averages 32%, including 20% serious damage by wet and leaking berries. In most samples no decay, in many samples from 6 to 10%, averages 3%, Gray Mold Rot mostly advanced, some in early stages.

Respondent's customer promptly reported the results of the inspection to Respondent, but inadvertently characterized the inspection as unrestricted. Respondent promptly passed on the results of the inspection to complainant and also represented the inspection to be unrestricted. Complainant stated that it would "accept the rejection" if the inspection as truly unrestricted. Respondent contacted the U.S.D.A. inspection office in Cleveland and found that the inspection was restricted and reported such to complainant. Complainant then requested that an unrestricted inspection be made. On instructions from complainant, the berries were placed with J.F. Sanson in Cleveland to be handled on a consignment basis. The berries were unloaded from the truck and on May 8, 1985, at 2:45 p.m., the strawberries were subjected to an unrestricted federal inspection. Such inspection showed temperatures "in various lugs 37° to 39° F." Condition was stated to be as follows:

> Generally ripe and firm and fairly bright to bright. Calyxes and fresh and green. Damage by bruising ranges from 3 to 70%, averages 19%, including 15% serious damage by wet and leaking berries scattered throughout pack and lot. Decay averages 1%.

5. On May 5, 1985, complainant sold to respondent 2,496 flats of Sunset abel strawberries at $3.50 per flat, plus $.65 per flat cooling and palletizing, plus 6 units of Tectrol at $19.00, and a temperature recorder at $22.50, or a total of $10,494.90 f.o.b.

6. Complainant shipped the strawberries covered by Finding of Fact 5 to respondent's customer, Pick-N-Pay Supermarkets, Inc., in Cleveland, Ohio, on May 5, 1985, at 11:30 a.m. The strawberries arrived at the place of business of respondent's customer on the morning of May 9, 1985, and were federally

inspected at 1:15 p.m. on that day after having been partially unloaded for the purpose of inspection. Such inspection showed, in relevant part, as follows:

> Temperature of Product: Loaded lot: Nearest rear doors: Top 45° F., bottom 45° F. Unloaded lot: in various locations 40 to 45° F. Condition: Each lot: Generally ripe and firm. Fairly bright to bright. Calyxes fresh and green. Damage by bruising: Unloaded lot: ranges from 5 to 50%, averages 24%, including 13% serious damage by wet and leaking berries; Loaded lot: ranges from 10 to 55%, average 22%, including 11% serious damage by wet and leaking berries. Unloaded lot: Decay averages less than 1%. Loaded lot: Decay averages ½ to 1%.

Upon receiving the results of the federal inspection from its customer, respondent reported such results to complainant and rejected the load. Complainant "refused to accept the rejection" and the berries were turned over to J.F. Sanson to be sold on a consignment basis.

7. J.F. Sanson promptly resold both loads of berries and rendered a detailed accounting on both loads showing gross proceeds of $12,291.50 on the first load and $9,154.50 on the second load. After deducting expenses pertaining to the resale and freight, complainant received total net returns for both loads in the amount of $13,969.40.

8. An informal complaint was filed on June 28, 1985, which was within nine months from the time the causes of action alleged herein accrued.

Conclusions

The rejections made by respondent relative to both loads of strawberries were prompt and unequivocal. Consequently, such rejections were effective and complainant had no option as to whether it would "accept" the rejections. *See Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, PACA Docket No. 2-6979, Decided July 27, 1987, 46 Agric. Dec. ____ (1987); and *Produce Brokers & Distributors v. Monsour's*, 36 Agric. Dec. 2022 (1977). Where an effective rejection is made, the burden is upon the shipper to show that the rejection was wrongful. Where the rejected commodity was sold on an f.o.b. basis, the shipper also has the burden of proving transportation services and conditions to be abnormal so as to void the warranty of suitable shipping condition. *See Bud Antle, Inc. v. J.M. Fields, Inc. a/t/a Worldwide Produce*, 38 Agric. Dec. 844 (1979). Complainant submitted Ryan recorder tapes applicable to each load which showed temperatures at a steady 35 degrees Fahrenheit. Both of such tapes are incomplete in that the copies submitted are cut off at approximately the 42nd hour, whereas the first load was in transit for approximately 72 hours and the second load in transit for approximately 96 hours. The temperatures shown by the federal inspections applicable to the first load of strawberries are not indicative of abnormal transportation. The temperatures shown by the federal inspection applicable to the second load of strawberries are somewhat high. However, respondent points out that pursuant to complainant's desire that an unrestricted inspection be made of the strawberries, a large portion of the load had been taken off

the truck and put on the receiver's siding and the doors of the truck were left open in order to facilitate an unrestricted inspection. Complainant submitted a statement from its receiver indicating that outside temperatures were between 80 and 85 degrees at the time the strawberries were inspected on May 9. We conclude that complainant has failed to meet its burden of proving by a preponderance of the evidence that abnormal transportation conditions prevailed relevant to either of the loads of strawberries. Consequently, the suitable shipping condition warranty is applicable to both loads. Both the range of defects and the average defects indicated by both unrestricted inspections demonstrate that neither load of strawberries made good delivery. We conclude that complainant breached the contract of sale relative to both loads of strawberries. The complaint should be dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

SUN WORLD INTERNATIONAL, INC. v. PEPSICO FOOD SYSTEMS, INC.
PACA Docket No. 2-7136.
Decision and Order issued October 19, 1987.

Jurisdiction - freight claim--Payment - application of.

Complainant sought reparation in connection with two shipments of lettuce to respondent and for freight incurred in connection with a shipment of broccoli to a third party. It was held that the Secretary had no jurisdiction over the freight claim. It was also found that respondent had failed to demonstrate that it had paid for the two lettuce shipments since complainant was warranted in applying respondent's payments to other transactions including freight claims over which the Secretary had no jurisdiction.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Brian H. Cole, Esq., Wichita, Kansas, for Respondent.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $6,364.80 in connection with the shipment in interstate commerce of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the

case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement, complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Sun World International, Inc., is a corporation whose address is P.O. Box 9110, Bakersfield, California.

2. Respondent, Pepsico Food Systems, Inc., is a corporation whose address is P.O. Box 3037, Wichita, Kansas. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about November 14, 1984, complainant sold to respondent under its invoice No. 58-69754-0, 435 cartons of iceberg lettuce, naked, 2 dozen, at $7.68 per carton, or $3,340.80 f.o.b.

4. On or about November 14, 1984, complainant shipped the lettuce to respondent's subsidiary, in Manassas, Virginia. Respondent accepted the lettuce upon arrival in Virginia and has not paid complainant any part of the purchase price.

5. On or about December 14, 1984, complainant sold to respondent 300 cartons of lettuce, naked, 2 dozen, at $7.53 per carton, or a total of $2,259.00 f.o.b.

6. On or about December 14, 1984, complainant shipped the lettuce to respondent's subsidiary in Youngwood, Pennsylvania. Respondent accepted the lettuce upon arrival and has not paid complainant any part of the purchase price.

7. An informal complaint was filed on July 23, 1985, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant included along with its claim for the lettuce a claim in the amount of $765.00 for freight in regard to several shipments of broccoli. Respondent alleges that the broccoli was not purchased from complainant but from a third party and that complainant's only function in regard to the broccoli was to provide transportation. Respondent asserts that in consequence the Secretary has no jurisdiction to award reparation for these freight charges. We agree. Complainant did not attempt to rebut respondent's allegation that the broccoli was sold to respondent, not by complainant, but by a third party. Accordingly, we conclude that complainant was only providing transportation services to respondent, and even though the transit services related to a perishable commodity, such services were not incident to a perishable transaction between complainant and respondent See, *Maine Banana Corporation v. Walter D. Davis, Inc.*, 32 Agric. Dec. 98[illegible] (1973). See also, 10 Harl, Agricultural Law, § 72.10[2][a] at n. 19. The complaint, insofar as it relates to the claims for freight in the total amount of $765.00, should be dismissed.

Although the formal complaint listed several shipments of lettuce, an examination of respondent's answering statement and complainant's statement in reply shows that only the two transactions covered by the Findings of Fact are in issue in this proceeding. Respondent admits receipt and acceptance of the two shipments of lettuce, but maintains that due to a failure of complainant to include on its invoices a reference to respondent's purchase orders, "accounting clerks employed by Respondent and its corporate affiliate, FSI, were forced to make payment decisions based upon their best guess as to whether a particular shipment for which Respondent and/or FSI had been invoiced was, in fact, received." Respondent then outlines how payment was made for the shipment containing 435 cartons of lettuce covered by Findings of Fact 3 and 4 in response to a different invoice covering 300 cartons of lettuce. Respondent states that it simply marked out the number 300 and inserted the number 435, and paid on the basis of 435 cartons. Complainant's reply to this somewhat puzzling defense is that when it received the altered invoice along with respondent's check, it simply applied the check to the invoice to the extent necessary to pay such invoice, and applied the balance to delinquent freight charges on broccoli shipments. Complainant points out that the check submitted by respondent stated on its face the invoice number for the shipment of 300 cartons of lettuce and not the invoice number for the 435 cartons of lettuce. Parenthetically, we note that the 300 cartons are not those involved in the other transaction in issue in this proceeding. We can see no problem with complainant making such an application of the payment to the 300 cartons of lettuce which complainant invoiced, nor do we see any problem with complainant's application of the surplus to the broccoli shipments. See *Anthony Gagliano & Co. v. Jennaro*, 27 Agric. Dec. 1343 (1968). As complainant points out, this leaves the invoice covered by Finding of Fact still unpaid.

Complainant's defense in regard to the shipment covered by Findings of Fact 5 and 6 is similar in nature to the defense outlined above. In this case, respondent simply paid an invoice for a different 300 cartons of lettuce at a different and lower price. Respondent's assertion that this constitutes payment of the invoice covered by Findings of Fact 5 and 6 is somewhat ludicrous. We find that there remains due and owing to complainant the sum of $5,599.80. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $5,599.80, with interest thereon at the rate of 13% per annum from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

TEIXEIRA FARMS, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5913.
Order issued October 5, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

TENNECO WEST, INC. v. LOWELL PRODUCE, INC.
PACA Docket No. 2-5789.
Order issued October 20, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER VACATING PRIOR ORDER AND REPARATION ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a timely complaint was filed in which the complainant sought reparation against respondent in the amount of $32,684.55 in connection with four transactions, in interstate commerce, involving apples, a perishable agricultural commodity. Respondent filed an answer to the complaint in which he generally denied the complainant's allegations. On July 23, 1981, after the Department was notified that respondent had filed a petition in bankruptcy, this matter was stayed. At various times since then, the presiding officer has attempted to determine the status of the respondent's bankruptcy petition in order that some disposition could be made of this case. On September 1, 1987, the Department received notice from the complainant that, at some unknown time, the respondent's bankruptcy petition had been dismissed. After receiving that notice, the presiding officer notified counsel for the respondent as follows:

> ***We believe that *you had an obligation to this forum to inform us* promptly as to such a dismissal. Your failure to do so has allowed this matter to continue to be stayed long after such stay could have been vacated, and may have prevented the complainant from being able to collect any indebtedness which the respondent owes it.
>
> In view of the above, we intend to vacate the stay issued July 23, 1981, to strike the answer filed by you on behalf of your client, and to issue an order against your client requiring it to pay complainant $32,684.55,

plus interest at the rate of 13% per annum from February 1, 1981, until paid. [Emphasis added]

Responent's counsel was given ten days to respond to that notice. In his response, in part, he stated: "I certainly believe that Tenneco West, Inc. is entitled to a judgment against Lowell Produce, Inc."[1] We interpret this as an admission, by respondent, of the material allegations in the complaint. Accordingly, the Stay Order issued July 22, 1981, is vacated, and the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the rules of practice (7 C.F.R. § 47.8(d)).

Complainant, Tenneco West, Inc., is a corporation whose address is 201 New Stine Road, Bakersfield, California 93389. Respondent, Lowell Produce, Inc., is a corporation whose address is Route 1, Box 4A, Lowell, Arkansas 72745. At the time of the transactions involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $32,684.55. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $32,684.55, with interest thereon at the rate of 13 percent per annum from February 1, 1981, until paid.

Copies of this order shall be served upon the parties.

TEXAS CITRUS EXCHANGE v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5874.
Order issued October 2, 1987.

Order issued by Donald A Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

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[1]Respondent's counsel used a great deal of rhetoric in explaining why he should not have been considered to have been obligated to notify *complainant* that the respondent's bankruptcy petition had been dismissed. However, we agree with the presiding officer that counsel had an obligation to notify the Department, from whom his law firm had solicited a stay order because of that bankruptcy filing, that the respondent's bankruptcy petition was dismissed.

GLENWOOD TUCKER d/b/a TUCKER PRODUCE COMPANY *v.* A.J. SALES COMPANY and/or DANA R. JOHNSON d/b/a U.S. FOOD MARKETING.
PACA Docket No. 2-7480.
Ruling issued October 9, 1987.

Andrew Y. Stanton, Presiding Officer.
Lea Daughtry, Smithfield, North Carolina, for Complainant.
Thomas B. Smith, Orlando, Florida, for Respondent A.J. Sales.
Ruling issued by Donald A. Campbell, Judicial Officer.

RULING ON PETITION TO REOPEN AND PETITION FOR RECONSIDERATION

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on September 5, 1987, awarding reparation to complainant against respondent A.J. Sales Company (hereinafter, "A.J.") in the amount of $11,526.00 plus interest, and dismissing the complaint against respondent Dana R. Johnson d/b/a U.S. Food Marketing (hereinafter, "U.S.F.M."). Respondent A.J. has filed a petition for reconsideration, and has also filed a petition to reopen to take further evidence.

The petition to reopen must be denied, as it was not timely filed. The Rules of Practice state clearly that a petition to reopen may be filed "at any time prior to the issuance of the final order." 7 C.F.R. § 47.24(b). In this case, the petition to reopen was not filed until September 15, 1987, ten days after issuance of the final order. Even if we were to consider the petition on its merits, it would nonetheless be denied. Respondent A.J. wishes to introduce evidence relating to a reparation proceeding in which it has filed a complaint against respondent U.S.F.M., PACA Docket No. 2-7454. However, the complaint in that case concerns ten truckloads of various produce, not including sweet potatoes, allegedly sold by respondent A.J. to respondent U.S.F.M. in November and December 1985. The transactions involved in the present case concern four loads of sweet potatoes, and took place in February 1986. These are obviously different from the transactions subject to respondent A.J.'s complaint in PACA Docket No. 2-7454. Therefore, the evidence respondent A.J. seeks to introduce would be irrelevant to the current proceeding.

With respect to the petition for reconsideration, we believe the questions raised by such petition were sufficiently considered in the issuance of the September 5, 1987, Decision and Order and the petition should thus be dismissed without service on the other parties (7 C.F.R. § 47.24(a)). Specifically, respondent A.J. claims that complainant failed to meet its burden of proving that respondent A.J. purchased the sweet potatoes, claiming that consignment terms were in effect. This claim was properly rejected in the Decision and Order for the reasons stated herein. Respondent A.J. also argues that judicial notice should not have been taken of market prices set forth in the Market News Service Reports and by the Canadian Department of Agriculture. However,, this practice has consistently been held to be

proper. *Tom Bengard Ranch, a/t/a Kleen Harvest v. Garden State Farms, Inc.*, 42 Agric. Dec. 922, 928 (1983). Accordingly, the petition for reconsideration is hereby dismissed.

The reparation awarded in the Decision and Order, including interest, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

VAL-MEX FRUIT COMPANY, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5872.
Order issued October 2, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This matter was stayed July 7, 1982, pending completion of respondent's bankruptcy. Having heard nothing further, the Presiding Officer suggested that the complaint be dismissed as the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint was dismissed.

GEORGE VILLALOBOS d/b/a/ TEKSUN BRAND INTERNATIONAL v. UNITED DISTRIBUTORS, INC.
PACA Docket No. 2-7041.
Order issued October 21, 1987.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $10,089.75 in connection with a transaction in interstate and foreign commerce involving mangos, a perishable agricultural commodity. A sworn answer was filed, on behalf of respondent, by a Mr. William Bayze in which he denied any liability to complainant. After this matter was ready for order, but before an examiner's report was prepared, Mr. Bayze was indicted on, and pleaded guilty to, charges that he violated 18 U.S.C. § 1001 by making false statements on sworn documents which were filed in other reparation

ases pending under the Act.[1] *See United States v. Bayze*, Docket No. CR 7-56-AAH, United States District Court for the Central District of California. he presiding officer, after taking official notice of this criminal proceeding, operly struck all of Mr. Bayze's sworn statements from the record.[2] As ese statements constituted all of respondent's proof in defense, the presiding ficer gave respondent an opportunity to show cause why an order should not mediately be issued against it. Respondent did show cause why such an der should not immediately be issued against it, and was given an portunity to submit a properly verified answering statement. In giving this portunity to respondent, the presiding officer notified it that "a failure to bmit a sworn answering statement will result in the issuance of a decision ainst it." As respondent did not file an answering statement in response to s letter, we conclude that it has admitted its liability to complainant with spect to the subject shipment. Accordingly, the issuance of an order without ther procedure is appropriate pursuant to section 47.8(d) of the Rules of actice (7 C.F.R. § 47.8(d)).

Complainant, George Villalobos is an individual doing business as Teksun and International whose address is 1865 Decatur Drive, San Jose, lifornia 95122. Respondent, United Distributors, Inc., is a corporation ose address is 746 So. Central Avenue, Suite 200A, Los Angeles, lifornia 90021. At the time of the transaction involved herein, respondent s licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the dings of fact of this order. On the basis of these facts, we conclude that the ions of respondent are in violation of section 2 of the Act (7 U.S.C. § 499b) d have resulted in damages to complainant of $10,089.75. Accordingly, hin 30 days from the date of this order, respondent shall pay to mplainant, as reparation, $10,089.75, with interest thereon at the rate of 13 rcent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

STA McALLEN, INC. v. AGRICULTURE BUSINESS OF TEXAS, INC.
ACA Docket No. 2-7349.
ecision and Order issued October 19, 1987.

omplainant's accountings showing lower amount due constitute an admission of same, even ithout explanation of same--Evidence by respondent not acceptable or admissable if not

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[1]It is noted that Mr. Bayze was indicted on additional charges, including making false tatements in the filing of the answer in the instant matter, but that he was allowed to plead guilty to only two of the seven counts on which he was indicted as part of a plea bargain

[2]Such statements were left in the body of the record, but were not considered as evidence.

properly sworn to--Evidence which is not self-explanatory as to relevancy and purpose, should be explained by party offering it.

Sixteen loads of watermelons were sold to respondent. Respondent had made partial payments. Complainant claimed $65,000 was still owed, although monthly statements sent to respondent showed only $20,114.27. Held for complainant for $20,114.27.

Allan R. Kahan, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of $65,574.49 against respondent in connection with the sale of sixteen (16) loads of watermelons to respondent which were shipped in or in contemplation of interstate or foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer denying liability on various basis.

Although the amount claimed in the formal complaint exceeds $15,000.00 the parties waived oral hearing, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is, therefore, applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Neither party did so.

Findings of Fact

1. Complainant, Vista McAllen, Inc., is a corporation whose address is P.O. Box 45316, Los Angeles, California 90045. At the time of the ransactions involved herein, complainant was licensed under the Act.

2. Respondent, Agriculture Business of Texas, Inc., is a corporation whose address is P.O. Box 514, Edinburg, Texas 78540. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On January 22, 1985, complainant, by oral contract, sold respondent 64 cartons of watermelons consisting of 5,225 pounds of watermelon at a price of $.14 per pound f.o.b., for a total invoice value of $731.50. The watermelon were loaded at McAllen, Texas, and destined for Rogers Produce, Edinburg, Texas. The watermelons arrived at their destination and were received and accepted.

4. On March 20, 1985, complainant, by oral contract, sold respondent 150 cartons of watermelons, consisting of 10,523 pounds of watermelon at a price of $.18 per pound f.o.b., for a total invoice value of $1,894.14. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at their destination and were received and accepted by respondent.

5. On March 28, 1985, complainant, by oral contract, sold respondent 62 cartons of watermelons, consisting of 4,621 pounds of watermelon at a price of $.165 per pound f.o.b., for a total invoice value of $762.47. The watermelons were loaded at McAllen, Texas and destined for Lid Co., Saskatchewan, Saskatchewan, Canada. The watermelons arrived at their destination and were received and accepted.

6. On or about March 30, 1985, complainant, by oral contract, sold respondent 50 cartons of watermelons, consisting of 10,523 pounds of watermelon at a price of $.18 per pound f.o.b., for a total invoice value of $1,894.14. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

7. On April 4, 1985, complainant, by oral contract, sold respondent 576 cartons of watermelons, consisting of 42,684 pounds of watermelon at a price of $.22 per pound f.o.b., for a total invoice value of $9,390.70. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

8. On April 5, 1985, complainant, by oral contract, sold respondent 576 cartons of watermelons, consisting of 40,945 pounds of watermelon at a price of $.22 per pound f.o.b., for a total invoice value of $9,007.90. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

9. On April 6, 1985, complainant, by oral contract, sold respondent 608 cartons of watermelons, consisting of 43,812 pounds of watermelon at a price of $.22 per pound f.o.b., for a total invoice value of $9,638.64. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

10. On April 9, 1985, complainant, by oral contract, sold respondent 300 cartons of watermelons, consisting of 21,271 pounds of watermelon at a price of $.22 per pound f.o.b., for a total invoice value of $4,679.62. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

11. On April 9, 1985, complainant, by oral contract, sold respondent 153 cartons of watermelons, consisting of 10,989 pounds of watermelon at a price of $.22 per pound f.o.b., for a total invoice value of $2,417.50. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at

respondents's place of business and were received and accepted by respondent.

12. On April 11, 1985, complainant, by oral contract, sold respondent 32 cartons of watermelons, consisting of 2,393 pounds of watermelon at a price of $.26 per pound f.o.b., for a total invoice value of $622.18. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

13. On April 17, 1985, complainant, by oral contract, sold respondent 149 cartons of watermelons, consisting of 11,654 pounds of watermelon at a price of $.25 per pound f.o.b., for a total invoice value of $2,913.50. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

14. On April 27, 1985, complainant, by oral contract, sold respondent 576 cartons of watermelons, consisting of 40,988 pounds of watermelon at a price of $.19 per pound f.o.b., for a total invoice value of $7,787.72. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

15. On April 27, 1985, complainant, by oral contract, sold respondent 225 cartons of watermelons, consisting of 11,959 pounds of watermelon at a price of $.19 per pound f.o.b., for a total invoice value of $2,272.21. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

16. On May 1, 1985, complainant, by oral contract, sold respondent 256 cartons of watermelons, consisting of 18,763 pounds of watermelon at a price of $.10 per pound f.o.b., for a total invoice value of $1,876.30. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

17. On May 2, 1985, complainant, by oral contract, sold respondent 384 cartons of watermelons, consisting of 27,493 pounds of watermelon at a price of $.10 per pound f.o.b., for a total invoice value of $2,749.30. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

18. On May 3, 1985, complainant, by oral contract, sold respondent 608 cartons of watermelons, consisting of 44,460 pounds of watermelon at a price of $.09 per pound f.o.b., for a total invoice value of $4,001.40. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondent's place of business and were received and accepted by respondent.

19. On May 3, 1985, complainant, by oral contract, sold respondent 256 cartons of watermelons, consisting of 18,818 pounds of watermelon at a price of $.09 per pound f.o.b., for a total invoice value of $1,783.52. The watermelons arrived at respondent's place of business and were received and accepted by respondent.

20. On May 3, 1985, complainant, by oral contract, sold respondent 96 cartons of watermelons, consisting of 7,472 pounds of watermelon at a price of $.09 per pound f.o.b., for a total invoice value of $672.48. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

21. On May 4, 1985, complainant, by oral contract, sold respondent 608 cartons of watermelons, consisting of 42,955 pounds of watermelon at a price of $.10 per pound f.o.b., for a total invoice value of $4,295.50. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondents's place of business and were received and accepted by respondent.

22. On May 7, 1985, complainant, by oral contract, sold respondent 428 cartons of watermelon at a price of $.09 per pound f.o.b., for a total invoice value of $2,937.06. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondent's place of business and were received and accepted by respondent.

23. On May 8, 1985, complainant, by oral contract, sold respondent 576 cartons of watermelons, consisting of 44,463 pounds of watermelon at a price of $.09 per pound f.o.b., for a total invoice value of $4,001.67. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondent's place of business and were received and accepted by respondent.

24. On May 8, 1985, complainant, by oral contract, sold respondent 544 cartons of watermelons, consisting of 41,390 pounds of watermelon at a price of $.10 per pound f.o.b., for a total invoice value of $4,139.00. The watermelons were loaded at McAllen, Texas and destined for respondent's place of business in Edinburg, Texas. The watermelons arrived at respondent's place of business and were received and accepted by respondent.

25. As of December 12, 1985, respondent had paid for all purchases made up through May 2, 1985, as set forth in paragraphs 3 through 16, leaving a balance of $20,114.27.

26. A formal complaint was filed on September 20, 1985, which was within nine (9) months of when the causes of action stated herein accrued. A revised formal complaint was received on June 5, 1986.

Conclusions

Respondent presented the statements it received from complainant, statements dated 12/6/85, 12/23/85, 12/28/85, 1/3/86, 1/24/86, and 6/13/86. All the statements show the respondent's outstanding balance to be $20,114.27.

Complainant had an opportunity to challenge the documents it prepared and submitted to respondent, which statements obviously contradict its own allegations as to the amount owed, but failed to do so. The statements sent to respondent constitute an admission of the remaining balance due, given the fact that complainant did not dispute the amount set forth in its own invoicing statement. We conclude that the remaining balance on the sales equals the $20,114.27 set forth in the statements.

Although complainant was given an opportunity to file additional evidence to challenge or rebut the facts and inferences drawn from respondent's evidence, complainant did not do so. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the other side of have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted in *Trenton Livestock, Inc.*, 33 Agric. Dec. 499 (1974). Under the circumstances, the failure of complainant to introduce evidence on this issue gives rise to the strong inference that such evidence would have been adverse to complainant. See, *United States v. Di Re*, 332 U.S. 581, 593; *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

Respondent introduced with its answer eighty-eight (88) pages of documentary evidence, consisting primarily of reproduction of 3" x 4" cards on pages, with various boxes and numbers in the boxes, and which appears to be a packing record of some kind for April 16, 17, 21, 24, 25, 26, 27 and 29, and May 1 and 3. Aside from the fact that some of the documents are only partially legible, nowhere in respondent's answer does it explain what the documents are, what information they contain, and for what purpose they are being submitted to the record. From the dates on the documents, they could be relevant to respondent's defense, but we have no way of knowing.

Without such guidance and information being provided by the party submitting them for the record, they are less than useless, for they clutter the file with apparently irrelevant material. Since respondent did not avail itself of the opportunity to explain for what reason the documents were submitted, and their relevance and materiality is not apparent on their face, we shall not attempt to surmise their importance.

Respondent's answer admits to owing complainant $16,311.56, rather than the $20,114.27 amount shown on the invoices complainant sent to respondent. Such amount is arrived at by the subtracting from the $65,574.49 complainant alleges it is owed, $36,082.68 in allegedly unpaid packout costs incurred by respondent in connection with complainant's watermelon crop; and further subtracting $13,180.15, the cost of watermelons complainant purchased from respondent in May 1985, and has not paid for. Such amounts constitute set offs. Since complainant did not seek to rebut or contest these figures, we normally would accept them as accurate under the same reasoning previously given. However, respondent's Answer is not properly sworn as required by 7 C.F.R. § 47.20(h). Therefore, it cannot be given evidentiary value. *Frank W. Prillwitz, Jr. v. Sheehan Produce*, 19 Agric. Dec. 1213 (1960).

Given such evidence, we find the only money due and owing to complainant with respect to these transactions is that which is set forth on complainant's statements to respondent, namely $20,114.27.

Order

Within thirty (30) days from the date of this order, respondent shall pay to complainant, as reparation, $20,114.27, with interest thereon at the rate of 13% per annum, from June 1, 1985, until paid.

Copies of this order shall be served on the parties.

WASHBURN POTATO CO. v. B.R. WOOD and TROY E. WOOD, d/b/a WOOD BROS.
PACA Docket No. 2-6984.
Decision and Order issued October 7, 1987.

Burden of proof--Partnership - liability after dissolution.

Complainant seller sustained its burden of proving its contract with respondent, respondent's breach, and the resulting damages. Whether or not the respondent partnership had dissolved prior to the transactions is irrelevant to respondent's liability, as long as complainant had no notice of the dissolution.

Drew Y. Stanton, Presiding Officer.
Complainant, pro se.
John P. Derrick, Lexington, South Carolina, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,286.50 in connection with the alleged sale of two truckloads of potatoes to respondent, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given an opportunity to submit additional evidence in the form of verified statements and file briefs. Respondent submitted an answering statement and complainant submitted a statement in reply. Neither party filed a brief. After the case was referred to the Presiding Officer for the preparation of his report, the parties were given the opportunity to submit additional evidence which the Presiding Officer determined was necessary for a proper disposition of the case. Both parties submitted such additional evidence.

Findings of Fact

1. Complainant, Washburn Potato Co., is a corporation whose address is P.O. Box 158, Washburn, Maine.

2. Respondent, B.R. Wood and Troy E. Wood d/b/a Wood Bros., was licensed under the Act as a partnership at the time of the transactions alleged in the complaint, with an address of P.O. Box 13491, Columbia, South Carolina. On October 19, 1984, the Department received a license renewal application, signed by Troy E. Wood, as owner, indicating no change in the status of respondent. Respondent's license terminated on its anniversary date, September 21, 1985.

3. On November 6, 1984, George R. Umphrey, who at that time was president of complainant, acting on complainant's behalf, personally sold to Troy E. Wood, acting on behalf of respondent, 200 sacks of potatoes at $2.75 per sack, and 700 sacks of potatoes at $3.75 per sack, for a total of $3,175.00, delivered (Shipment A).

4. On November 7, 1984, complainant shipped the potatoes of Shipment A to respondent. Complainant prepared a bill of lading, showing the shipment of 900 sacks of potatoes to respondent, located at 125-126 State Farmers Market, Columbia, South Carolina. The bill of lading was signed by someone purporting to represent respondent, indicating receipt of the potatoes.

5. On November 14, 1984, Mr. Umphrey, acting on complainant's behalf, personally sold to Troy E. Wood, representing respondent, 586 sacks of potatoes at $2.75 per sack, for a total of $1,611.50, delivered (Shipment B).

6. On November 19, 1984, complainant shipped the potatoes of Shipment B to respondent. Complainant prepared a bill of lading, showing the shipment of 586 sacks of potatoes to respondent, located at 125-126 State Farmers Market, Columbia, South Carolina. The bill of lading was signed by someone purporting to represent respondent, indicating receipt of the potatoes.

7. Complainant has been paid $500,00 for Shipments A and B, leaving $4,286.50 allegedly due and owing.

8. A formal complaint was filed on July 26, 1985, which was within nine months from when the alleged causes of action herein accrued.

Conclusions

Respondent, through its representative, Troy E. Wood, denies liability, claiming that it never purchased the potatoes. Troy E. Wood, asserts that the respondent partnership did not exist at the time of the transactions alleged in the complaint, as it was dissolved several years earlier, upon the death of one of the partners, B.R. Wood. Troy E. Wood also claims to have left the Columbia, South Carolina, market in 1983.

As the moving party herein, it is complainant's burden to prove the contract terms, respondent's breach, and the resulting damages, by a preponderance of the evidence. *Wilbur Sonny Parker v. VBJ Packing*, 42 Agric. Dec. 1217 (1983). Complainant's president at the time of the alleged sales, George R. Umphrey, has asserted in a sworn statement that he personally sold to Troy E. Wood, acting for respondent, the two loads of potatoes at issue. Complainant has submitted bills of lading which are signed by someone purporting to represent respondent, indicating receipt of the two loads of

potatoes herein. This is strong evidence supporting the existence of the alleged contracts of sale. Respondent's Troy E. Wood's claim that the respondent partnership dissolved on the alleged death of his partner, B.R. Wood, is contradicted by the Department's license records, of which we take udicial notice, which show that respondent was continuously licensed until eptember 21, 1985 (Finding of fact 2). The Department was never notified hat B.R. Wood had died. Further, Troy E. Wood submitted to the epartment on October 19, 1984, on behalf of respondent, a license renewal rm signed by him as owner, but not indicating that the partnership had anged in any way. Even if the partnership had dissolved, complainant was titled to actual notice of the dissolution, and there is no evidence that it ceived such notice. The failure to give complainant notice of the dissolution bjected the partners to joint and several liability to complainant for nsactions entered into subsequent to the dissolution. *Albin P. Crutchfield W.K. Marz Produce and/or L. & A. Produce*, 24 Agric. Dec. 1133 (1965). spondent's Troy E. Wood denies there were any transactions with nplainant, as he claims he left the Columbia, South Carolina, market in 3. This claim is belied by his October 19, 1984, license renewal form mitted on behalf of respondent, which shows respondent's address as lumbia, South Carolina, unchanged from previous forms. In addition, pondent has offered no explanation concerning the evidence of pondent's involvement shown by the signatures on complainant's bills of ng for the two loads of potatoes, apparently done on respondent's behalf. spondent's general denials in its pleadings are not sufficient to rebut the ng evidence that the potatoes were purchased, received and accepted by pondent.

Having accepted the potatoes, respondent became liable for their contract e, less damages due to any breach by complainant, which respondent has claimed. Complainant has asserted that it received $500.00 from pondent, and is currently owed $4,286.50. This assertion is supported by record. Respondent's failure to pay this sum to complainant is a violation section 2 of the Act, for which reparation should be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay to mplainant, as reparation, $4,286.50, with interest thereon at the rate of 13% r annum, from January 1, 1985, until paid.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(Summarized)

C. A. ABATTI d/b/a ALEX ABATTI BROKERAGE a/t/a A & M PRODUCE CO. v. INTERCOAST MARKETING INC.
PACA Docket No. RD-88-14.
Default order issued October 21, 1987.

Respondent was ordered to pay complainant, as reparation, $3,821.00 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

ACTION PRODUCE v. A & E PRODUCE CORP.
PACA Docket No. RD-87-540.
Default order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $12,810.35 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

BUD ANTLE INC. a/t/a BUD OF CALIFORNIA v. MAC PRODUCE INC.
PACA Docket No. RD-88-21.
Default order issued October 22, 1987.

Respondent was ordered to pay complainant, as reparation, $5,183.80 plu 13 percent interest per annum thereon from September 1, 1986, until paid.

ASSOCIATED POTATO GROWERS, INC. v. MAGNOLIA FRUIT & PRODUCE CO., INC.
PACA Docket No. RD-87-514.
Order issued October 26, 1987.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that respondent had paid in full an authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

SOCIATED PRODUCE DISTRIBUTORS v. 668 COMPANY INC.
CA Docket No. RD-87-520.
fault Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $2,250.00 plus percent interest per annum thereon from October 1, 1986, until paid.

LA PRODUCE DISTRIBUTORS INC. v. SOUTHWEST MARKETING L. INC.
A Docket No. RD-88-3.
ult Order issued October 15, 1987.

espondent was ordered to pay complainant, as reparation, $8,168.70, plus rcent interest per annum thereon from April 1, 1987, until paid.

OWIN-STATE INC. v. CENTRAL PRODUCE CO. INC.
A Docket No. RD-87-386.
r issued October 8, 1987.

ORDER DENYING MOTION TO REOPEN,
VACATING STAY ORDER,
REINSTATING DEFAULT ORDER
(Summarized)

espondent moved to reopen this proceeding after default. Complainant a motion, opposing the motion to reopen.
espondent's explanations did not constitute good reasons why an answer not timely filed. Therefore, the motion to reopen after default was d.
he Stay Order was vacated and the Default Order, previously issued, was tated. The amount awarded, including interest, was ordered paid within ays from the date of this order.

BASIN PRODUCE CORP. v. DEMPSEY-SPENCE INC. a/t/a SAN JACINTO PRODUCE COMPANY.
PACA Docket No. RD-88-7.
Default Order issued October 20, 1987.

Respondent was ordered to pay complainant, as reparation, $7,270.00 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

JAVIER P. BAUTISTA d/b/a BAUTISTA PRODUCE v. AGGREDI INTERNATIONAL LTD.
PACA Docket No. RD-88-22.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $1,368.70 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

BEN GAY INC. v. SUNWORTH PACKING COMPANY.
PACA Docket No. RD-87-536.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $5,141.85 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

BILLY THE KID PRODUCE INC. v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-521.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $4,632.50 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

PAUL B. BIXBY v. J. A. HOWELL d/b/a J. A. HOWELL PRODUCE.
PACA Docket No. RD-87-516.
Default Order issued October 8, 1987.

Respondent was ordered to pay complainant, as reparation, $4,263.00 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

)NITA VALLEY APPLE CO., INC. v. HANSEN FOODS, INC.
CA Docket No. RD-87-372.
)rder Issued October 26, 1987.

STAY ORDER
(Summarized)

Respondent moved that this matter be reopened after default. The default der previously issued was stayed pending receipt of complainant's answer to spondent's petition to reopen.

LAVO GROWERS OF CALIFORNIA v. TRI-COUNTY PRODUCE INC.
CA Docket No. RD-87-541.
'ault Order Issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $6,565.25 plus percent interest per annum thereon from December 1, 1986, until paid.

LAVO GROWERS OF CALIFORNIA v. DEMPSEY-SPENCE INC a/t/a
N JACINTO PRODUCE COMPANY.
CA Docket No. RD-88-6.
'ault Order Issued October 20, 1987.

Respondent was ordered to pay complainant, as reparation, $3,058.00 plus percent interest per annum thereon from February 1, 1987, until paid.

D. CHRISTOPHER RANCH v. SOUTHWEST MARKETING INT'L. INC.
ACA Docket No. RD-87-547.
efault Order Issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $27,922.50 plus
3 percent interest per annum thereon from April 1, 1987, until paid.

COASTAL BROKERS INC. v. TRI-COUNTY PRODUCE INC.
PACA Docket No. RD-87-542.
Default Order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $3,863.20 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

COMMUNITY-SUFFOLK INC. v. THE PIONEER FRUIT & COMMISSION CO.
PACA Docket No. RD-87-549.
Default Order issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $7,557.75 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

CROWN PACKING COMPANY INC. v. SUNSHINE TOMATO CO. INC.
PACA Docket No. RD-87-533.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $1,100.95 plus 13 percent interest per annum thereon from August 1, 1987, until paid.

GERALD W. DASHER AND ROBERT E. DASHER d/b/a G&R FARMS.
PACA Docket No. RD-87-388.
Order issued October 8, 1987.

ORDER REOPENING AFTER DEFAULT
(Summarized)

Respondent filed a motion to reopen this proceeding after default. Good reason was shown why the relief requested in the motion should be granted.

Accordingly, respondent's default in the filing of an answer was set aside and the proposed answer submitted by respondent was ordered filed.

[New docket number is PACA RD-88-11.---Editor.]

)EL MONTE FRESH FRUIT COMPANY v. McALLEN PRODUCE CO. NC.
'ACA Docket No. RD-87-528.
'efault Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $2,793.12 plus percent interest per annum thereon from July 1, 1987, until paid.

XIE GROWERS, INC. v. MARTIN AND JONES PRODUCE INC.
CA Docket No. RD-87-510.
der issued October 26, 1987.

ORDER TO SHOW CAUSE

In this reparation proceeding under the Perishable Agricultural nmodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a complaint filed alleging respondent's failure to pay $39,941.45 to complainant for chases of produce in interstate commerce. A copy of the complaint was 'ed upon respondent, but respondent has failed to file an answer and is ; in default.

Prior to the issuance of a default order, respondent sent the Department ieck to complainant for $39,655.35, claiming that such was the amount :ed to between the parties for the purpose of settlement. The check was /arded to complainant, and complainant was asked to acknowledge that complaint had been settled so that an order of dismissal could be issued. ıplainant has never responded.

Accordingly, complainant will have ten days from its receipt of this order bject to dismissal of its complaint. In the absence of any such objection, will issue an order of dismissal.

Copies of this order shall be served upon the parties.

RANTE & TERMINI INC. v. SUN-GLO INC.
CA Docket No. RD-87-544.
'ault Order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $5,200.00 plu percent interest per annum thereon from August 1, 1986, until paid.

EBIA/PROXORA DISTRIBUTING INC. v. SOUTHWEST MARKETIN(INT'L. INC.
PACA Docket No. RD-88-23.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $6,942.35 plu 13 percent interest per annum thereon from April 1, 1987, until paid.

EVERKRISP VEGETABLES INC. v. RICHARD CALLEJA d/b/a ORIEN PRODUCE & FOOD CO.
PACA Docket No. RD-88-10.
Default Order issued October 20, 1987.

Respondent was ordered to pay complainant, as reparation, $23,884.50 plu 13 percent interest per annum thereon from December 1, 1986, until paid.

GOLD DIGGER APPLES INC. v. McALLEN PRODUCE CO. INC.
PACA Docket No. RD-87-526.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $1,109.00 plu 13 percent interest per annum thereon from July 1, 1986, until paid.

GRIFFIN-HOLDER CO. v. LEGRANT MORRIS d/b/a CLEVELAN FRUIT MARKET.
PACA Docket No. RD-87-483.
Order issued October 8, 1987.

STAY ORDER
(Summarized)

Respondent must file a motion to reopen, setting forth good reason wl its answer was not timely filed. The default order previously issued in th proceeding was stayed pending receipt of complainant's answer respondent's petition to reopen.

...IN, WHITE & PRINCE INC. v. CHAPMAN PRODUCE CO. INC.
PACA Docket No. RD-88-9.
Default Order issued October 20, 1987.

Respondent was ordered to pay complainant, as reparation, $5,535.50 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

HELLE-DAVIS COMPANY v. McALLEN PRODUCE CO. INC.
PACA Docket No. RD-87-527.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $107.50 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

HORWATH AND CO. INC. a/t/a GONZALES PACKING COMPANY v. McALLEN PRODUCE CO. INC.
PACA Docket No. RD-87-525.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $1,421.25 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

HORWATH & CO. INC. a/t/a GONZALES PACKING CO. v. BROOKS A. LISENBEY d/b/a LISENBEY'S PRODUCE.
PACA Docket No. RD-87-535.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $9,142.50 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

HORWATH & CO. INC. a/t/a GONZALES PACKING CO. v. BROOKS A. LISENBEY d/b/a LISENBEY'S PRODUCE.
PACA Docket No. RD-87-535.
Order issued October 27, 1987.

STAY ORDER
(Summarized)

Respondent moved that this matter be reopened after default.

Accordingly, the default order previously issued was stayed pending receipt of complainant's answer to respondent's petition to reopen.

J-B DISTRIBUTING CO. v. WORLD FOODS INC.
PACA Docket No. RD-87-543.
Default Order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $623.30 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

CHARLES J. KOENIG, JR. d/b/a C. J. KOENIG & SON v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-522.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $1,339.45 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

BROOKS A. LISENBEY d/b/a LISENBEY'S PRODUCE v. DONA A. PENNINGTON d/b/a PENNINGTON'S PRODUCE.
PACA Docket No. RD-88-15.
Default Order issued October 21, 1987.

Respondent was ordered to pay complainant, as reparation, $1,020.00 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

LOOKOUT MOUNTAIN TOMATO & BANANA CO. INC. v. WAYNE EASLEY d/b/a CRAFT TOMATO CO.
PACA Docket No. RD-87-519.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $3,343.90 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

McDONNELL & BLANKFARD INC. v. CONSUMER QUALITY FOOD SERVICES INC.
PACA Docket No. RD-88-2.
Default Order issued October 15, 1987.

Respondent was ordered to pay complainant, as reparation, $3,981.50 plu
ercent interest per annum thereon from October 1, 1986, until paid.

M McLEAN CO. v. S&K FARMS, INC.
A Docket No. RD-87-385.
er issued October 8, 1987.

ORDER REOPENING AFTER DEFAULT
(Summarized)

espondent filed a motion to reopen this proceeding after default. Good
n was shown why the relief requested in the motion should be granted.
ccordingly, respondent's default in the filing of an answer was set aside
he proposed answer submitted by respondent was ordered filed.
New docket number is PACA RD-88-10.---Editor.]

INTERNATIONAL v. 668 COMPANY INC.
A Docket No. RD-87-548.
ult Order issued October 19, 1987.

espondent was ordered to pay complainant, as reparation, $2,433.84 plus
rcent interest per annum thereon from October 1, 1985, until paid.

EX CORP. v. DAVIS DISTRIBUTORS INC.
A Docket No. RD-87-468.
er issued October 8, 1987.

ORDER (Continuance)
(Summarized)

This proceeding was continued until the Department receives prope
fication that respondent's proceeding now pending in the United State
kruptcy Court has been closed or dismissed.

TRO PRODUCE INC. v. SUNNYSIDE PRODUCE CO.
CA Docket No. RD-87-534.
fault Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $17,093.25 plu
percent interest per annum thereon from November 1, 1986, until paid.

MID-ATLANTIC PRODUCE SALES INC. v. INTERSTATE PRODUCE.
PACA Docket No. RD-88-8.
Default Order issued October 20, 1987.

Respondent was ordered to pay complainant, as reparation, $18,767.95 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

MIRANDA GROVES v. STANLEY SUSSMAN INC. a/t/a ANGELO DiGIACOMO.
PACA Docke No. RD-88-17.
Default Order issued October 22, 1987.

Respondent was ordered to pay complainant, as reparation, $6,591.65 plus 13 percent interest per annum thereon from March 1, 1987, until paid.

MULTIPATAT INC. v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-545.
Default Order issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $2,750.00 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-546.
Default Order issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $5,218.50 plus 13 percent interest per annum thereon from February 1, 1987, until paid.

O. P. MURPHY PRODUCE COMPANY INC. a/t/a O. P. MURPHY & SONS v. SIX FLAGS PRODUCE INC.
PACA Docket No. RD-88-28.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $44,422.30 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

MARC J. OLESKY d/b/a SKY TROPICAL FRUIT v. SUNSPROUT HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-87-539.
Default Order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $4,505.42 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

PARK RIVER POTATO CO. INC. v. DEWAYNE PROVENCE d/b/a PROVENCE PRODUCE.
PACA Docket No. RD-87-513.
Default Order issued October 8, 1987.

Respondent was ordered to pay complainant, as reparation, $880.00 plus 13 percent interest per annum thereon from February 1, 1986, until paid.

CLAYTON J. PELLETIER & JAMES T. PIANETTA d/b/a P & P PRODUCE CO. v. SUNSPROUT HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-88-16.
Default Order issued October 22, 1987.

Respondent was ordered to pay complainant, as reparation, $2,047.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

ROYAL FRUIT COMPANY v. JANDO'S PRODUCE INC.
PACA Docket No. RD-88-18.
Default Order issued October 22, 1987.

Respondent was ordered to pay complainant, as reparation, $ 3,538.75 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

SALOME SAENZ AND ALBERTO SALAZAR d/b/a S & S PRODUCE COMPANY v. RICHARD CALLEJA d/b/a ORIENT PRODUCE & FOOD CO. a/t/a ORIENTAL PRODUCE CORP.
PACA Docket No. RD-88-11.
Default Order issued October 21, 1987.

Respondent was ordered to pay complainant, as reparation, $9,856.75 plus 13 percent interest per annum thereon from February 1, 1987, until paid.

H. SCHNELL & COMPANY INC. v. GREEN GIANT FRUIT FAIR INC.
PACA Docket No. RD-87-518.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $3,540.50 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

H. SCHNELL & COMPANY INC. v. ANTHONY P. IACO d/b/a WESTVIEW FARMS.
PACA Docket No. RD-88-4.
Default Order issued October 15, 1987.

Respondent was ordered to pay complainant, as reparation, $6,732.75 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

S & H INC. a/t/a IDA PRIDE POTATO CO. v. SOUTHWEST MARKETING INT'L INC.
PACA Docket No. RD-88-25.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $11,444.00 plus 13 percent interest per annum thereon from May 1, 1987, until paid.

SIX L'S PACKING COMPANY INC. v. TWIG OF MIAMI INC. a/t/a BEST PRODUCE.
PACA Docket No. RD-87-531.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $14,646.50 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

THOMAS B. SMITH d/b/a THOMAS B. SMITH FARMS v. J. A. HOWELL d/b/a J. A. HOWELL PRODUCE.
PACA Docket No. RD-87-517.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $2,909.60 plus 13 percent interest per annum thereon from July 1, 1987, until paid.

VAN SOLKEMA FARMS INC. v. JOHNNY E. FAIR d/b/a MRS. FAIR'S FINER FOODS.
PACA Docket No. RD-88-24.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $2,408.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

SOURCE PRODUCE DISTRIBUTING CO. v. JOHN G. MANTIS d/b/a JOHN'S NORTHWEST PRODUCE.
PACA Docket No. RD-87-532.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $3,000.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

STONOCA FARMS CORPORATION v. PAT WOMACK INC.
PACA Docket No. RD-87-524.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $9,300.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

STOVEL-SIEMON LIMITED v. THE PIONEER FRUIT & COMMISSION CO.
PACA Docket No. RD-87-550.
Default Order issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $2,625.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

STRUBE CELERY & VEGETABLE CO. v. HERBS NOW.
PACA Docket No. RD-87-538.
Default Order issued October 16, 1987.

Respondent was ordered to pay complainant, as reparation, $12,745.29 plus 13 percent interest per annum thereon from April 1, 1987, until paid.

SUNKIST GROWERS INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-530.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $25,390.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

SUNSPROUTS OF TEXAS INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-529.
Default Order issued October 13, 1987.

Respondent was ordered to pay complainant, as reparation, $14,279.70 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

TAG AGRI DEVELOPMENT (USA) LTD. v. MARTIN S. SHOENFELD d/b/a URBAN FOODS.
PACA Docket No. RD-87-537.
Default Order issued October 14, 1987.

Respondent was ordered to pay complainant, as reparation, $1,728.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

TEX-SUN PRODUCE INC. v. ERINEO ESPINOSA.
PACA Docket No. RD-87-523.
Default Order issued October 9, 1987.

Respondent was ordered to pay complainant, as reparation, $29,143.27 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

TEX-SUN PRODUCE INC. v. JOSEPH J. STELLY d/b/a STELLY PRODUCE.
PACA Docket No. RD-88-12.
Default Order issued October 21, 1987.

Respondent was ordered to pay complainant, as reparation, $16,900.80 plus 13 percent interest per annum thereon from July 1, 1986, until paid.

LUCAS TRUJILLO PRODUCE INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-88-1.
Default Order issued October 15, 1987.

Respondent was ordered to pay complainant, as reparation, $22,573.50 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

UCON PRODUCE INC. v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-88-19.
Default Order issued October 22, 1987.

Respondent was ordered to pay complainant, as reparation, $4,950.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

VEG-A-MIX v. MEREX CORP.
PACA Docket No. RD-88-5.
Default Order issued October 15, 1987.

Respondent was ordered to pay complainant, as reparation, $663.75 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

SAM WONG FOOD CORP. INC. v. ALEXANDER J. MOSCHONAS d/b/a ALEXANDER'S WHOLESALE PRODUCE CO.
PACA Docket No. RD-87-511.
Order issued October 15, 1987.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that respondent had settled the matter and requested that the case be closed.

Accordingly, the complaint was dismissed.

WHITMORE DISTRIBUTING CO. INC. v. SANTA FE PRODUCTS IN(
PACA Docket No. RD-88-27.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $5,508.50 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

WHOLESALE PRODUCE CO. INC. v. KEN WELLS INC.
PACA Docket No. RD-88-26.
Default Order issued October 27, 1987.

Respondent was ordered to pay complainant, as reparation, $9,447.75 plus 13 percent interest per annum thereon from March 1, 1987, until paid.

WILSON MUSHROOM CO. INC. v. HUNTER FOODS INC.
PACA Docket No. RD-87-551.
Default Order issued October 19, 1987.

Respondent was ordered to pay complainant, as reparation, $4,864.00 plus 13 percent interest per annum thereon from May 1, 1987, until paid.

WILSON MUSHROOM CO. INC. v. JOSEPH MERLINO d/b/a JOSEPH MERLINO PRODUCE.
PACA Docket No. RD-88-13.
Default Order issued October 21, 1987.

Respondent was ordered to pay complainant, as reparation, $19,925.60 plus 13 percent interest per annum thereon from April 1, 1987, until paid.

In re: GONZALO ARROYO.
P.Q. Docket No. 190.
Decision and Order filed July 17, 1987.

Importation of apples without permit - Failure to file answer.

Cynthia Koch, for Complainant
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. § § 151-164a and 167), and regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent had violated the Act and sections 319.56(c) and 319.56-2(e) of the Code of Federal Regulations (7 C.F.R. § § 319.56(c), 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on March 7, 1986, by certified mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that respondent had twenty (20) days after receipt of the complaint to file an answer with the Hearing Clerk. Respondent was also informed that failure to file an answer to, or plead specifically to, any allegation in the complaint, would constitute an admission of such allegation. Additionally, respondent was informed that a failure to file an answer within the time allowed therefor would constitute an admission of the allegations in the complaint and a waiver of hearing. More than twenty (20) days have elapsed since respondent was served with the complaint. Respondent has not filed an answer. Accordingly, under the plain provisions of the Rules of Practice, a default decision should be granted in this case. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Gonzalo Arroyo, herein referred to as the respondent, is an individual whose address is 2024 E. Monte Vista, Phoenix, Arizona 85006.

2. On or about July 20, 1985, the respondent imported into the United States at Nogales, Arizona, from Mexico, approximately one bag of apples in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the apples were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent is hereby assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final October 14, 1987.---Editor]

In re: MILAGROS DIAZ.
P.Q. Docket No. 187.
Decision and Order filed July 15, 1987.

Importation of mangoes without permit - Failure to deny allegations.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Plant Quarantine Act of August 20, 1912, as amended (Act), for a violation of the regulations issued under the Act that govern the importation into the United States of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed on February 26, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about June 25, 1985, the respondent had imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from the Dominion Republic, approximately thirteen mangoes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were

not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56(e)).

In response to the complaint, respondent filed an answer dated March 11, 1986. In her answer, respondent indicated her address and explained why she was sending in a check for twenty-five dollars ($25.00). However, respondent failed to deny or otherwise respond to any other allegation in the complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent has admitted the material allegations in the complaint, and, therefore, respondent has waived her right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Milagros Diaz, is an individual whose address is 231 West 96th Street, Apartment 60, New York, New York 10025.

2. On or about June 25, 1985, respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from the Dominion Republic, approximately thirteen mangoes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent, Milagros Diaz, is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall by payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final October 14, 1987.---Editor.]

In re: ANITA E. FISHLEY.
P.Q. Docket No. 197.
Decision and Order issued July 27, 1987.

Importation of mangoes without permit - admission of material allegations.

Cynthia Koch, for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Plant Quarantine Act of August 20, 1912, as amended (Act), for a violation of the regulations issued under the Act that govern the importation into the United States of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed on February 28, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about July 2, 1985, the respondent had imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Jamaica, New York, approximately five mangoes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56(e)).

In response to the complaint, respondent filed an answer dated March 17, 1986. In her answer, respondent admitted certain material allegations in the complaint. Specifically, respondent indicated her address and admitted that she imported the mangoes into the United States from Jamaica. Respondent explained that the mangoes were gifts for her children, that she did not know it was wrong to bring mangoes into the United States, and that her intention was not to violate any regulations of the United States. Respondent's explanations were not mitigating circumstances that should be considered in regard to whether the requested civil penalty should be assessed. *In re: Richard Duran Lopez*, ___ Agric. Dec. ___, ___ (1985).

In her answer, respondent failed to deny or otherwise respond to the other material allegations in the complaint. In accordance with section 1.136 (c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent has either admitted or is deemed to have admitted the material allegation in the complaint, and,

Therefore, respondent has waived her right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted or is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Anita E. Fishley, is an individual whose address is 710 Tinton Avenue, Apartment 9F, Bronx, New York 10455.

2. On or about July 2, 1985, respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Jamaica, approximately five mangoes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent, Anita E. Fishley, is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00) which shall by payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final October 14, 1987.---Editor.]

In re: JESUS HERNANDEZ.
P.Q. Docket No. 256.
Decision and Order issued July 17, 1987.

Importation of limes from Mexico - failure to file answer.

Robert Broussard, for complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER (DEFAULT)

This proceeding was instituted under the Act of August 20, 1912, as amended (Act) (7 U.S.C. § § 151-164a and 167), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated section 319.27-3 of the regulations promulgated thereunder (7 C.F.R. § 319.27-3). Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, upon respondent.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed within twenty (20) days after receipt of the complaint, and that failure to file an answer would constitute an admission of the allegations in the complaint, under 7 C.F.R. § 1.136(c). The respondent was also informed that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Jesus Hernandez, respondent, is an individual whose address is 1305 Maryland Avenue, Laredo, Texas 78040.

2. On or about October 19, 1985, at Laredo, Texas, respondent imported approximately 20 limes from Mexico into the United States in violation of 7 C.F.R. § 319.27-3, because the importation of limes from Mexico is prohibited.

Conclusion

The respondent has failed to file any answer to any of the allegations in the complaint. The consequences of such a failure were explained to the respondent in the complaint and in the letter of service that accompanied it. By his silence respondent has admitted all of the material allegations of fact in the complaint and has waived a hearing.

reason of the Findings of Act set forth above, the respondent has l the Act and regulations promulgated thereunder. The following order :fore issued.

Order

pondent Jesus Hernandez is hereby assessed a civil penalty of five l dollars ($500), which shall be payable to the "Treasurer of the United by certified check or money order, and which shall be forwarded to APHIS Field Servicing Office, Accounting Section, Butler Square th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within 30) days from the effective date of this order.

order shall have the same force and effect as if entered after full and shall be final and effective 35 days after service of this Decision ler upon respondent, unless there is an appeal to the Judicial Officer t to section 1.145 of the Rules of Practice applicable to this proceeding 2. § 1.145).

; Decision and Order became final October 15, 1987.---Editor.]

CEVIN B. MONTGOMERY.
cket No. 300.
;sued October 15, 1987.

/, for complainant.
ıt, pro se.
d by Victor W. Palmer, Administrative Law Judge.

DISMISSAL

he reasons expressed by the Judicial Officer on August 12, 1987, in *ntice*, P.Q. Docket No. 161, this case is dismissed.

ONALD MOSLEY.
ket No. 304.
sued October 15, 1987.

, for Complainant.
t, pro se.
d by Victor W. Palmer, Administrative Law Judge.

DISMISSAL

ıe reasons expressed by the Judicial Officer on August 12, 1987, in *ntice*, P.Q. Docket No. 161, this case is dismissed.

In re: TRIANGLE AVIATION SERVICES.
P.Q. Docket No. 327.
Decision and Order issued September 11, 1987.

Improper disposal of foreign origin garbage - Admission of material allegations.

Joseph Pembroke, for complainant.
Carmine Gesuele, for respondent.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the improper storage and movement on certain means of conveyance of foreign origin garbage (7 C.F.R. § 330.400(b)(1) and 9 C.F.R. § 94.5(b)(1)), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § § 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a Complaint filed on april 8, 1987, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about December 16, 1986, the respondent removed foreign origin garbage which had arrived in New York, on SAS and KLM Airways flights, and placed the foreign origin garbage in a rolloff container used for dumping construction debris, in violation of sections 330.400(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1)) and section 94.5(b)(1) of the regulations (9 C.F.R. § 94.5(b)(1)), because the garbage was not removed in tight, leak-proof receptacles to an approved facility for incineration, sterilization, or grinding as required.

On April 30, 1987, the respondent filed an Answer responding to and admitting the allegations contained in the Complaint. This admission of the allegations contained in the Complaint constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Triangle Aviation Services, Inc., herein referred to as the respondent, is a corporation incorporated in New York and whose mailing address is Building 110, John F. Kennedy International Airport, Jamaica, New York 11430.

2. On or about December 16, 1986, the respondent removed foreign origin garbage which had arrived in New York, on SAS and KLM airways flights, and placed the foreign origin garbage in a rolloff container used for dumping construction debris, in violation of section 330.400(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1)) and section 94.5(b)(1) of the regulations (9 C.F.R. § 94.5(b)(1)), because the garbage was not removed in tight, leak-proof receptacles to an approved facility for incineration, sterilization, or grinding as required.

Conclusion

ɔn of the facts contained in the Findings of Fact above, the has violated section 330.400(b)(1) of the regulations (7 C.F.R. § l)) and section 94.5(b)(1) of the regulations (9 C.F.R. §

e, the following order is issued.

Order

ondent, is hereby assessed a civil penalty of five hundred dollars This penalty shall be payable to the "Treasurer of the United rtified check or money order, and which shall be forwarded to nent of Agriculture, APHIS Field Servicing Office, Accounting er Square West, 5th Floor, 100 North Sixth Street, Minneapolis, 5403, within thirty (30) days from the effective date of this order. hall have the same force and effect as if entered after a full hall be final and effective thirty-five (35) days after service of this Order upon respondent, unless there is an appeal to the Judicial ıant to section 1.145 of the Rules of Practice applicable to this 7 C.F.R. § 1.145).

ision and Order became final October 23, 1987.---Editor.]

In re: VALLEY FEED MILL INC. OF PARIS.
USWA Docket No. 86-2.
Order issued October 15, 1987.

Jeffrey H. Kahn, for Complainant.
Shirley Baccus-Lobel, Dallas, Texas, for Respondent.
Order issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL ORDER

Upon consideration of the motion of the Complainant to dismiss the case without prejudice and it appearing that such dismissal will be in the interests of all parties in interest;

NOW THEREFORE IT IS ORDERED that this case be dismissed without prejudice.

CONSENT DECISIONS ISSUED

OCTOBER 1987

(Not published herein.---Editor)

Animal Quarantine and Related Laws

HANSEN, ROGER A. A.Q. Docket No. 161. October 8, 1987.

HISE, RONALD and BOBBY ALLEN BELL. A.Q. Docket No. 301. October 28, 1987.
HOWLE, ENOS and DR. HENRY A. TILLETT. A.Q. Docket No. 181. October 13, 1987.
LUKE, JAMES RAY. A.Q. Docket No. 325. October 2, 1987.
PERDUE, JIM A.Q. Docket No. 296. October 15, 1987.
SCARMARDO, PETER A. d/b/a SCARMARDO CATTLE CO. and WAYNE GIBSON d/b/a GIBSON CATTLE CO., INC. A.Q. Docket No. 195. October 15, 1987.
WHITE, LARRY and BIG SPRINGS CATTLE CO. A.Q. Docket No. 278. October 5, 1987.

Animal Welfare Act

FORWARD, FAY. AWA Docket No. 342. October 13, 1987.
GUTHRIE, FRANCIS PATRICK, d/b/a JULES and BECK COMBINED CORP. AWA Docket No. 314. October 28, 1987.

Packers and Stockyards Act

BAUMERT, OSCAR J., JR. P.&S. Docket No. 6803. October 26, 1987.
DIXIE LIVESTOCK, INC., TOMMIE TURNER, JR., INC., TOMMIE TURNER, JR., GREENVILLE LIVESTOCK, INC., W. BRYAN HARGETT, JR., PATE'S LIVESTOCK, INC., CIRCLE S LIVESTOCK INC., N. ADOLPH STEWART, and BARBARA E. STEWART. P.&S Docket No. 6738. October 23, 1987.
DIXIE LIVESTOCK, INC., TOMMIE TURNER, JR., INC., TOMMIE TURNER, JR., GREENVILLE LIVESTOCK, INC., W. BRYAN HARGETT, JR., PATE'S LIVESTOCK, INC., CIRCLE S LIVESTOCK INC., N. ADOLPH STEWART, and BARBARA E. STEWART. P.&S Docket No. 6738. October 15, 1987.
GREEN ACRES ENTERPRISES, INC. P.&S. Docket No. 6868. October 30, 1989.
HEBER, GLEN. P.&S. Docket No. 6904. October 15, 1987.
SMITH BROS., INC., H. EDWARD SMITH, and PATRICK J. SMITH P.&S. Docket No. 6847. October 13, 1987.
VALDEN MEAT CO., INC., and JOHANNA WALTER. P.&S. Docket No. 6829. October 28, 1987.

Plant Quarantine Act

AMERICAN PRESIDENT LINES, INC. P.Q. Docket No. 291. 10/22/87.
NUSSELDER, ADAM P.Q. Docket No. 207. 10/19/87.
VENUS SHIPPING COMPANY, LIMITED. P.Q. Docket No. 58. 10/23/87.

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